(25,748)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 918.

GEORGE S. FULLINWIDER, APPELLANT,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 16, 1917.

No. 2638

United States

Circuit Court of Appeals

For the Ninth Circuit.

GEORGE S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, THE SOUTHERN PACIFIC COMPANY, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation, THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, a Corporation, THE SOUTHERN PACIFIC LAND COMPANY, a Corporation, and THE CALIFORNIA LAND & WATER COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Names and Addresses of Attorneys.

For Appellant:

J. MACK LOVE, Esq., and WALTER E. BURKE, Esq., 1219 Hollingsworth Building, Los Angeles, California.

For Appellees:

HENRY T. GAGE, Esq., and W. I. GILBERT, Esq., 1204–10 Merchants National Bank Building, Los Angeles, California;

CHAS. R. LEWERS, Esq., 842 Flood Building, San Francisco, California; and

LUTHER G. BROWN, Esq., 330 Van Nuys Building, Los Angeles, California. [3*]

In the United States District Court in and for the Southern District of California, Southern Division.

No. A–103—IN EQUITY.

GEO. S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE

*Page-number appearing at foot of page of original certified Record.

CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE EQUITABLE TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California; The IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California; and the CALIFORNIA LAND & WATER COMPANY, a Corporation,

Defendants.

Citation to Defendants and Appellees.

The United States of America,
Ninth Judicial Circuit,—ss.

To the Southern Pacific Railroad Company of California, The Southern Pacific Company, The Southern Pacific Railroad Company, The Imperial Valley Farm Lands Association, The Central Trust Company of New York, The Equitable Trust Company of New York, The Southern Pacific Land Company, The California Land & Water Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth [4] Circuit, in the City of San Francisco in said Circuit on the 22d day of June, 1915, pursuant to an appeal petitioned for by the complainant and appellant herein, and allowed by the Judge of said court and filed in the clerk's office of the District Court of the United States for the Southern District of California, Southern Division, wherein

Geo. S. Fullinwider is complainant and appellant and you and each of you are defendants and appellees, to show cause, if any there be, why the judgment and decree rendered against the said complainant as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the complainant in that behalf.

The next term of said court will convene in the City of San Francisco on the 4th day of October, 1915.

WITNESS the Honorable BENJAMIN F. BLEDSOE, District Judge of the United States, at Los Angeles, California, within said Circuit, this 24th day of May, 1915, in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States of America the one hundred and thirty-ninth year.

BLEDSOE,
United States District Judge.

Now, we hereby, this 24 day of May, 1915, accept due personal service of this citation on behalf of the Southern Pacific Railroad Company, The Southern Pacific Railroad Company of California, the Southern Pacific Company, the Imperial Valley Farm Lands Association, The Southern Pacific Land Company, The Central Trust Company, and the Equitable Trust Company, appellees.

CHAS. R. LEWERS and
W. I. GILBERT,
Attorneys for Above-named Defendants and Appellees. [5]

Now, I hereby, this 24th day of May, 1915, accept due personal service of this citation on behalf of the

California Land & Water Company, defendant and appellee.

LUTHER G. BROWN,

Attorney for Above-named Defendant and Appellee. [6]

[Endorsed]: No. A–103. United States District Court, Southern District of California, Southern Division. Geo. S. Fullinwider vs. Southern Pacific R. R. Co. et al., Citation. Filed May 24, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [7]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. A–103—EQUITY.

GEORGE S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, a Corporation, THE SOUTHERN PACIFIC

LAND COMPANY, a Corporation of California, THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California, and THE CALIFORNIA LAND & WATER COMPANY, a Corporation,

Defendants. [8]

[Record of Enrollment.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. A-103—EQ.

GEORGE S. FULLINWIDER,

Complainant,

vs.

SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, et al.,

Defendants.

On the 1st day of December, 1913, complainant filed herein his Bill of Complaint, which is hereto annexed;

On said 1st day of December, 1913, a Subpoena ad respondendum was issued, returnable as provided by law, which Subpoena is hereto annexed;

On the 22d day of December, 1913, a Motion to Strike the Bill of Complaint was filed herein by defendant Southern Pacific Railroad Company, and is hereto annexed;

On the 22d day of December, 1913, a Motion to Dismiss the Bill of Complaint was filed herein by defendant Southern Pacific Railroad Company, and is hereto annexed;

On the 23d day of November, 1914, complainant filed herein his Amended Bill of Complaint, which is hereto annexed;

On the 27th day of November, 1914, a Subpoena ad respondendum addressed to the U. S. Marshal for the Southern District of California, was issued, and is hereto annexed;

On said 27th day of November, 1914, a Subpoena ad respondendum addressed to the U. S. Marshal for the Northern District of California, was issued, and is hereto annexed;

On the 18th day of December, 1914, a Motion to Dismiss Amended Bill was filed by defendants, Southern Pacific Railroad [9] Company of California, a corporation, et al., and is hereto annexed;

On the 21st day of December, 1914, a Motion to Dismiss Amended Bill was filed herein by defendant, The California Land and Water Company, and is hereto annexed;

On the 18th day of January, 1915, a Motion to Dismiss Amended Bill of Complaint was filed herein by defendant, The Equitable Trust Company of New York, and is hereto annexed;

On the 26th day of January, 1915, a Motion to Dismiss Amended Bill of Complaint was filed herein by defendant, Central Trust Company of New York, and is hereto annexed;

On the 5th day of April, 1915, the Motions to Dismiss of the various defendants herein came on to be heard and argument was had thereon, and thereafter, on the 26th day of April, 1915, a Decree dismissing the Amended Bill of Complaint herein was signed,

filed, entered and recorded herein, and is hereto annexed. [10]

In the United States District Court in and for the Southern District of California, Southern Division.

GEO. S. FULLINWIDER,

Complainant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation, SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation, THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California, THE CALIFORNIA LAND AND WATER COMPANY, a Corporation of California, and the IMPERIAL VALLEY FARM LAND ASSOCIATION, a Corporation of California,

Defendants.

Amended Bill in Equity.

To the Honorable, OLIN WELBORN and BENJAMIN F. BLEDSOE, Judges of said court, the

above-named complainant states that he is a citizen and resident of the State of California and that he complains of the defendants and for cause of action alleges:

I.

That the above-named defendant, The Southern Pacific Company is a corporation; that this complainant has not the information sufficient to state under what state or laws it is incorporated; that the defendant, The Southern Pacific Railroad Company of California is a corporation organized and existing under the laws of the State of California; that defendant, Southern Pacific Railroad Company of Arizona is a corporation organized and existing under the laws of the State of Arizona; Southern Pacific Railroad Company of New Mexico is a corporation, organized and existing under the laws of the State of New Mexico; [11] that the defendant, The Central Trust Company of New York is a corporation organized and existing under the laws of the State of New York; that the defendant, The Equitable Trust Company of New York is a corporation organized and existing under the laws of the State of New York; that the defendant The Southern Pacific Land Company is a corporation organized and existing under the laws of the State of California; that the defendant, The California Land and Water Company is a corporation organized and existing under the laws of the State of California; that the Imperial Valley Farm Land Association is, as complainant is informed and believes, a corporation organized and existing under the laws of the State of California.

II.

That on the 3d day of March, 1871, there was granted by the Congress of the United States to the Texas Pacific Railroad Company, every alternate odd-numbered section of public land not mineral to the amount of ten (10) sections per mile not mineral within the limits of twenty (20) miles of the line of said railroad and within the State of California and said grant and act contained the following proviso: "That all of said lands granted by this section to said company which shall not be sold or otherwise disposed of as provided by said act within three years after the completion of the entire road shall be subject to settlement and pre-emption like other lands at a price to be fixed by and paid to said company at not exceeding an average of Two and 50/100 ($2.50) per acre for all lands herein granted."

III.

That said act and Section 23 thereof, made a further grant of every alternate odd-numbered section of the public land not mineral to the amount of ten (10) sections per mile [12] within the State of California within the limits of twenty (20) miles of the line of said railroad to the defendant herein from a point at or near Tehachepi Pass and a point of meeting with the said Southern Pacific Railroad at or near the Colorado River and said section 23 also contained the following provision, namely, "that for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized, subject to the laws of California, to construct a

line of railroad from a point at or near Tehachepi Pass by way of Los Angeles and the Texas Pacific Railroad Company at or near the Colorado River with the same rights, grants and privileges and subject to the same limitations and restrictions and conditions as were granted to said Southern Pacific Railroad Company by the act of July 27, 1866."

IV.

That on the 2d day of May, 1872, the Congress of the United States passed an act amendatory to the act of March 3, 1871, under which and among other things the conditions by which the grantees under the act of March 3, 1871, could mortgage said land so granted to secure the payments of bonds authorized to be issued by the grantees under said act.

V.

That the said line of the railroad of the defendants between Tehachepi Pass and the point of meeting of the Colorado River, as aforesaid by way of Los Angeles, was completed more than ten (10) years prior to the first day of December, 1913.

VI.

That among said lands which have not been sold or otherwise disposed of by said defendant under said grant, and as it was authorized and empowered to do by said grant and which are within ten (10) miles of the line of said railroad and within **[13]** the place limits of said grant in the County of Imperial; in the State of California is a tract of land described as follows, to wit: South one-half Section 5, Township 11 South, Range 14 East, San Bernardino B. and M.

VII.

That on the 29th day of October, 1913, this complainant tendered to the defendant the sum of Eight Hundred Dollars ($800) in gold coin of the United States, and thereupon complainant demanded of the defendants a conveyance by the defendants to the complainant of all their right, title and interest in and to the said lands, which demand was then and there refused by the said defendants to the injury and damage of this complainant. That said lands and the subject of this controversy exceed the sum of Three Thousand Dollars ($3,000) in value. That this complainant was eligible and qualified on the first day of December, 1913, and still is, to settle upon and pre-empt public lands of the United States and was a duly qualified entryman under the Desert Land laws of the United States and was and is duly qualified to purchase said lands under said acts of Congress above referred to in amounts not to exceed Three Hundred and Twenty (320) acres.

VIII.

That this complainant hereby now offers to pay into court the sum of Eight Hundred Dollars ($800) to be paid to defendant or such one of the defendants as the Court may determine is entitled to said money on the execution to him of a proper conveyance to complainant of said premises.

That this action is brought, among other things, for the purpose of having the Court interpret and construe the acts of Congress hereinbefore referred to and set out in the complainant's bill. [14]

That the complainant is informed and believes it

to be true that the defendants and each and every one of them have or claim some interest in and to the subject matter of this action, the exact character or nature of which this complainant is unable to state, but he demands that whatever interest said defendants or any of them have in or to the subject matter of this complaint that they be compelled to come in court and set up that interest.

WHEREFORE your complainant prays that a construction and interpretation be made by the Court in this action of said sections of said acts of Congress and especially of Sections Nos. 9 and 23 of the said act of Congress approved March 3, 1871, together with the supplementary act passed by Congress on May 2, 1872, and all other acts of Congress that have any relation to the application and constructions of the acts of March 3, 1871, and the act amendatory thereof of May 2, 1872.

2d. That it be adjudged and ordered that the defendants upon the payment into court of the amount of Eight Hundred Dollars ($800) as herein set out, convey to complainant all their right, title and interest in and to the lands herein described, and that said moneys so paid into court be ordered paid to defendant or defendants that the Court determines is entitled to receive the same.

3d. That the complainant have such other further and general relief as in equity and good conscience it is entitled to.

WALTER E. BURKE,
J. MACK LOVE,
Attorneys for Complainant. [15]

State of California,
County of Los Angeles,—ss.

Geo. S. Fullinwider, being by me first duly sworn deposes and says that he is the complainant in the foregoing action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his knowledge except as to the matters which are therein stated upon his information or belief and as to those matters, that he believes it to be true.

GEO. S. FULLINWIDER,

Subscribed and sworn to before me this 14th day of November, 1914.

[Seal] FLORENCE W. SAUNDERS,
Notary Public in and for the County of Los Angeles, State of California.

It is hereby ordered that the above amended complaint be filed.

BENJAMIN F. BLEDSOE,
Judge.

We hereby stipulate that the foregoing be filed herein as the Amended Complaint of the complainant.

Dated Nov. 21, 1914.

I. H. LEWERS and
W. I. GILBERT,
Attorneys for Defendants Southern Pacific Company, The Southern Pacific Railroad Company.

[16]

[Endorsed]: No. A. 103 Eq. United States District Court, Southern District of California, South-

ern Division. George S. Fullinwider, vs. Southern Pacific Company et al. Amended Bill in Equity. Received Copy of Within Amended Bill in Equity this 18th day of November, 1914. Attorneys for Defts. Filed Nov. 23, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Walter E. Burke, J. Mack Love, Attorney, Los Angeles, Cal. New Address, 1219 Hollingsworth Bldg. **[17]**

In the United States District Court, in and for the Southern District of California, Southern Division.

No. A—103.

GEORGE S. FULLINWIDER,

Complainant.

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation, SOUTHERN PACIFIC RAILROAD OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York, a Corporation, THE SOUTHERN PACIFIC LAND COMPANY, a Corporation, of California, THE CALI-

FORNIA LAND AND WATER COMPANY, a Corporation of California, and the IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California,

Defendants.

Motion to Dismiss Amended Bill in Equity.

To the United States District Court, in and for the Southern District of California, Southern Division: Honorable OLIN WELLBORN and BENJAMIN F. BLEDSOE, Judges thereof; and to Reuben Erickson, Complainant Above Named; and to Walter E. Burke and J. Mack Love, Attorneys for Complainant:

The above-named defendants, Southern Pacific Company, a corporation, the Southern Pacific Railroad Company of California, a corporation, and the Imperial Valley Farm Lands Association, a corporation of California, now move the above-entitled Court to dismiss the above-entitled action and bill of complaint therein, upon the ground:

I.

This Court is without jurisdiction of the subject matter of said action, and is without jurisdiction to hear or determine [18] said cause on its merits.

II.

That said Bill of Complaint does not state facts sufficient to constitute a cause of action in equity, or otherwise, or at all.

Upon the hearing of said motion, defendants will rely upon the Bill of Complaint in said action and upon all the acts of Congress referred to or mentioned in said Bill of Complaint.

Dated, Los Angeles, California, Dec. 18, 1914.

CHAS. R. LEWERS,
HENRY T. GAGE,
W. I. FOLEY, and
W. I. GILBERT,
Attorneys for Said Defendants.

WM. F. HERRIN,
Counsel for Said Defendants.

[Endorsed]: Original. No. A—103. In the United States District Court, in and for the Southern District of California, Southern Division. George S. Fullinwider, Complainant, vs. Southern Pacific Company, a Corporation, et als., Defendants. Motion to Dismiss Amended Bill in Equity. Due service admitted this 18th day of Dec., 1914. Walter E. Burke, Filed Dec. 18, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Henry T. Gage and W. I. Gilbert, 1204–10 Mer. Natl. Bank Bldg., Attorneys for Defendants. [19]

In the District Court of the United States, Southern District of California, Southern Division.

No. A–103—IN EQUITY.

GEORGE S. FULLINWIDER,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation,

SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, a Corporation, SOUTHERN PACIFIC LAND COMPANY, a Corporation, CALIFORNIA LAND AND WATER COMPANY, a Corporation, and the IMPERIAL FARM LAND ASSOCIATION, a Corporation,

Defendants.

Decree.

This cause having come on to be heard at this term on the 5th day of April, 1915, on the motions of the defendants to dismiss the amended bill of complaint, and having been argued by counsel for the respective parties at said time, and the Court having at said time ordered that said motions to dismiss be sustained without leave to amend;

Now, therefore, it is hereby ordered and decreed that said amended bill of complaint be and the same is hereby finally dismissed, and judgment is hereby given the said defendants for their costs in this suit in the sum of Thirty-four 40/100 (34.40) Dollars.

Dated April 26, 1915.

BENJAMIN F. BLEDSOE,
District Judge.

Decree Entered and Recorded April 26, 1915,
Attest: WM. M. VAN DYKE,
Clerk.
By T. F. Green,
Deputy Clerk. [20]

[Endorsed]: No. A—103. In the District Court of the United States, Southern District of California, Southern Division. George S. Fullinwider, Plaintiff, vs. Southern Pacific Company, a Corporation, et al., Defendants. Decree. Filed Apr. 26, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Charles R. Lewers, Attorney for Defendants, 828 Flood Building, San Francisco, Cal. [21]

In the United States District Court, in and for the Southern District of California, Southern Division.

No. A-103—IN EQUITY.

GEO. S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE EQUITABLE TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California; THE

IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation; and the CALIFORNIA LAND & WATER COMPANY, a Corporation,

Defendants.

Assignment of Errors.

And now comes the complainant, Geo. S. Fullinwider, and says that in the record and proceedings of said court in the above-entitled cause and in the final decree made and entered therein on the 26th day of April, 1915, there is manifest error and for error the said complainant assigns the following:

1. The Court erred in sustaining the motion to dismiss of the defendants, The Southern Pacific Railroad Company of California, The Southern Pacific Railroad Company, The Southern Pacific Company and the Imperial Valley Farm Lands Association to the amended bill of the complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

2. The Court erred in sustaining the motion to dismisss of the defendant, the Central Trust Company, to the amended bill of the [22] complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

3. The Court erred in sustaining the motion to dismiss of the defendant, the Equitable Trust Company, to the amended bill of the complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

4. The Court erred in sustaining the motion to dismiss of the defendant, the Southern Pacific Land

Company, to the amended bill of the complainant and directing that said amended bill be dismissed for want of equity in said amended bill.

5. The Court erred in sustaining the motion to dismiss of the defendant, the California Land & Water Company, to the amended bill of the complainant, and directing that said amended bill be dismissed for want of equity in said amended bill.

6. The Court erred in sustaining the motion of the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Roalroad Company, the Southern Pacific Company, and the Imperial Valley Farm Lands Association, to dismiss on the ground that the Court was without jurisdiction of the subject matter of said action and was without jurisdiction to hear and determine said cause on its merits.

7. The Court erred in susutaining the motion of the defendant, the Central Trust Company, to dismiss on the ground that the Court was without jurisdiction of the subject matter of said action and was without jurisdiction to hear and determine said cause on its merits.

8. The Court erred in sustaining the motion of the defendant, the Equitable Trust Company, to dismiss on the ground that the Court was without jurisdiction of the subject matter of said action and was without jurisdiction to hear and determine said cause on its merits. [23]

9. The Court erred in sustaining the motion of the defendant, the Southern Pacific Land Company, to dismiss on the ground that the Court was without

jurisdiction of the subject matter of said action and was without jurisdiction to hear and determine said cause on its merits.

10. The Court erred in sustaining the motion of the defendant, the California Land & Water Company, to dismiss on the ground that the Court was without jurisdiction of the subject matter of said action and was without jurisdiction to hear and determine said cause on its merits.

11. The Court erred in not overruling the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, The Southern Pacific Company, and the Imperial Valley Farm Lands Association's motion to dismiss and requiring the said defendants and each of them to answer or plead to said amended bill.

12. The Court erred in not overruling the defendant, the Central Trust Company's motion to dismiss and requiring the said defendant to answer or plead to said amended bill.

13. The Court erred in not overruling the defendant, the Equitable Trust Company's motion to dismiss and requiring the said defendant to answer or plead to said amended bill.

14. The Court erred in not overruling the defendant, the Southern Pacific Land Company's motion to dismiss and requiring the said defendant to answer or plead to said amended bill.

15. The Court erred in not overruling the defendant, the California Land & Water Company's motion to dismiss and requiring the said defendant to answer or plead to said amended bill.

16. The Court erred in that it did not hold that the amended bill of complaint of the complainant stated a good cause of action to which the defendants and each of them should be required to file their answer or plea.

17. The Court erred in entering a decree in favor of the [24] defendants, dismissing the complainant's amended bill and entering judgment against complainant in favor of the defendants for their cost and disbursements herein.

18. The Court erred in not granting to said complainant the relief prayed for by him in his said amended bill.

19. The Court erred in not granting to said complainant any equitable relief.

(a) As said amended bill contains allegations and matters entitling said complainant to equitable relief.

(b) Said amended bill contains allegations and matters entitling the said complainant to the relief prayed for in said amended bill.

20. The Court erred in holding that the complainant was not entitled to the relief prayed for by him in his said amended bill.

21. The Court erred in not holding that the proviso in Section 9 of the act of Congress of March 3, 1871, was a conditional limitation. Said proviso in Section 9 of said act is as follows:

> "That all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and

pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

22. The Court erred in not holding that the said proviso copied in assignment No. 21 was a conditional limitation.

That the happening of the conditions subsequent therein specified entitled the complainant herein to a specific performance of said contract upon the payment to the defendants of the amount of $2.50 per acre.

23. The Court erred in holding that there was not jurisdiction in the Court on the equity side to enforce a specific performance of said contract on behalf of the complainant upon the happening of the conditions subsequent in said proviso of [25] Section 9 of said act of Congress of March 3, 1871.

24. The Court erred in not holding that the proviso in Section 9 of the act of March 3, 1871, providing "that said lands not sold or otherwise disposed of within three years after the completion of the entire road should be subject to settlement and pre-emption like other lands," was sufficiently definite to be enforced as a conditional limitation.

25. The Court erred in not holding that the proviso in Section 9 of the act of March 3, 1871, was a binding contract upon the defendants and each of them, by which they and each of them were obligated to convey all interest they had in said land described in complainant's amended bill, upon the payment by the complainant to them or to whichever one of the

defendants the Court should direct the same should be paid to, or $2.50 per acre.

26. The Court erred in not holding that this suit can be maintained by complainant as one to enforce a specific performance of said contract or proviso.

(a) The defendants hold the legal title to and the possession of the said granted lands.

(b) Complainant having asked for specific performance equitable relief may and can be granted him by specific performance.

27. The Court erred in not holding that the provisions of said act of March 3, 1871, making said land grants, wherein it was provided "that all lands not sold or otherwise disposed of within three years after the completion of the entire road should be subject to settlement and pre-emption like other lands, etc." were both positive and negative, requiring the grantees and especially these defendants and each of them to sell to this complainant and to settlers who should apply to buy and who were eligible to settle upon or pre-empt public lands, at a price not greater than an average of $2.50 per acre, and requiring said [26] defendants to refrain from selling any of the granted lands to other than persons eligible to settle and pre-empt public lands, in such quantities as is provided by law for the disposition of public lands and at a price not greater than an average of $2.50 per acre.

28. The Court erred in holding that the defendant, the Southern Pacific Railroad Company of California, and each and every of the other defendants claiming an interest in said lands or the defendants

claiming by, through or under it, took said grant *only* "with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company by the act of July 27, 1866.

29. The Court erred in not holding that the proviso in Section 9 of the act of March 3, 1871, applied to and was binding upon the defendants and every one of them.

30. The Court erred in holding that the proviso in Section 9 of the act of March 3, 1871, was not binding upon the defendants and every one of them.

31. The Court erred in not holding that the proviso in Section 9 of the act of March 3, 1871, was designed to devote said lands conveyed by said grants "that had not been sold or otherwise disposed of by the defendants within three years after the completion of the entire road," to settlement and to prevent the monopoly of said lands. That said grant was a law as well as a grant, that said defendants could not defeat the purpose of the proviso requiring sales to settlers and pre-emptors, by themselves monopolizing and holding the lands and by refusing to sell at all or by refusing to sell any of them except to such persons and in such quantities and at such prices as they or either of them saw fit.

32. The Court erred in holding that the proviso in Section 9 of the act of Congress of March 3, 1871, was not a conditional [27] limitation, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the defendants or either of them to accept

and become vested with the title to the lands under the grant of March 3, 1871.

33. The Court erred in not holding that the proviso in Section 9 of said act of Congress of March 3, 1871, was and is a conditional limitation, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the Southern Pacific Railroad Company of California and the other defendants claiming an interest in said lands or claiming by, through or under said Southern Pacific Railroad Company of California, to accept and become vested with the title to the lands under the grant of 1871.

34. The Court erred in refusing to enter a decree of specific performance on behalf of Geo. S. Fullinwider, the complainant herein, and against the defendants, the Southern Pacific Railroad Company of California and each and every one of the other defendants claiming an interest in said lands or claiming by, through or under it, requiring said defendants to convey to the complainant the lands sought to be purchased by him, upon payment to them of the purchase price therefor, or $2.50 per acre.

35. The Court erred in holding that Congress did not intend, by the proviso in Section 9 of the act of March 3, 1871, to give to settlers and pre-emptors the right to compel the Southern Pacific Railroad Company of California and the other defendants claiming an interest in said lands, to sell to them the lands embraced within said grant, according to the terms of the proviso in said act of March 3, 1871.

36. The Court erred in not holding that the de-

fendant, the Southern Pacific Railroad Company of California, and the other defendants claiming an interest in said lands or claiming by, through or under it, be required to convey said lands to the [28] complainant applying to purchase the same and tendering to them $2.50 per acre in payment therefor.

37. The Court erred in refusing to direct and decree a specific performance on behalf of the complainant against the defendant, the Southern Pacific Railroad Company of California, and the other defendants claiming an interest in said lands or claiming by, through or under it, requiring said defendants to convey to said complainant the lands sought to be purchased by said complaint as prayed for in his amended bill.

38. The Court erred in holding that the proviso in said grant did not constitute a contract entered into by and between the defendant, the Southern Pacific Railroad Company of California and the Government, for the benefit of and enforceable by, the complainant.

39. The Court erred in holding that the proviso in Section 9 of the Act of March 3, 1871, providing "that said lands should be subject to settlement and pre-emption like other lands, that were not sold or otherwise disposed of by the defendants within three years after the completion of the entire road," was not a conditional limitation for the use and benefit of this complainant and those who in good faith, being eligible to make settlement and pre-empt public lands, who should apply to make settlement upon said lands and to purchase the same in quantities

and at the price provided by said act.

40. The Court erred in holding that the defendants, by the provisions of said grant contained, did not take in all lands still held by them under said grant which had not been sold or otherwise disposed of as provided, etc., a conditional limitation estate therein for the use and benefit of the complainant.

(a) The nature and quality of said interest in said grant are sufficiently specific and definite.

(b) The application to purchase, and tender of payment **[29]** and being eligible to make settlement and pre-emption on public lands is a sufficient identification.

41. The Court erred in not holding that the offer and tender of the complainant to purchase the lands described by him in his amended bill of complaint, from the defendant, the Southern Pacific Railroad Company of California and the other defendants claiming an interest in said lands or claiming by, through or under it, gave to the complainant a vested right in said lands in default of acceptance of such offer and a conveyance to him by the defendants.

42. The Court erred in not holding that the proviso in the Act of March 3, 1871, is sufficiently definite and certain to be enforced as a conditional limitation.

43. The Court erred in holding that the proviso in the act of March 3, 1871, providing "that said lands should be subject to settlement and pre-emption like other lands," was not sufficiently definite and certain as a conditional limitation and that it is not sufficiently definite and certain to be specifically enforced as a conditional limitation for the use

and benefit of the complainant.

44. The Court erred in not holding that the proviso in the act of March 3, 1871, providing "that said lands under certain conditions, should be subject to settlement and pre-emption like other lands," was intended by Congress as a conditional limitation for the use and benefit of the complainant and such other settlers as brought themselves within said proviso.

45. The Court erred in not holding that the proviso in the act of March 3, 1871, was a conditional limitation, impressed upon and running with the title to the land until the title should have ultimately become vested in a settled upon the terms and under the conditions provided in said grant.

46. In case the Court should have been of the opinion **[30]** that said conditions did not create a conditional limitation estate, then the Court erred in not holding that the defendant, the Southern Pacific Railroad Company of California and each and every of the defendants claiming an interest in said lands or claiming an interest, by, through or under it, took the titles to said lands in trust for this complainant and other settlers eligible to settle and pre-empt public lands and who brought themselves within the provisions of said act and upon said complainant or any other such settlers paying to the said defendant or defendants, the $2.50 per acre, they would be compelled to convey said lands to the complainant or such settlers.

47. The Court erred in holding that this complainant was not such a settler as was contemplated

by the act of March 3, 1871.

48. The Court erred in holding that the complainant did not have a vested interest in the land sought to be purchased by him, by reason of his offer and tender to purchase the land upon the terms provided in the act of March 3, 1871.

49. The Court erred in not holding that Geo. S. Fullinwider, the complainant herein, was entitled to the relief prayed for in his amended bill herein or to any relief, and in holding that said amended bill of complainant should be dismissed.

50. The Court erred in not holding that the defendants, The Southern Pacific Railroad Company of California, The Southern Pacific Railroad Company, The Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, The Equitable Trust Company, the Southern Pacific Land Company and the California Land & Water Company, individually and collectively, any or either of them, had violated the provisions of said act of Congress of March 3, 1871, relative to settlement and pre-emption of said lands by denying complainant's right under said act.

51. The Court erred in not holding that the defendants, [31] The Southern Pacific Railroad Company of California, The Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, The Equitable Trust Company, the Southern Pacific Land Company and the California Land & Water Company, or any or either of them had failed and refused and omitted to deal with

the said lands or any part thereof in breach of said act of Congress and had thereby defeated the settled policy and intent of Congress in the premises.

52. The Court erred in not holding that said proviso in Section 9 of the act of March 3, 1871, is enforceable by the compalinant.

53. The Court erred in not holding that it was impossible for the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the Equitable Trust Company, The Southern Pacific Land Company and the California Land & Water Company, or any or either of them, to receive said grant with the same "rights, grants and privileges" as those contained in the act of July 27, 1866, for the reason that the time within which they were required to perform the conditions of sections 8 or 12 of said act were not extended.

53½. The Court erred in holding that under Section 23 of the act of March 3, 1871, the Southern Pacific took said grant under the act of July 27, 1866.

(a) That said act of July 27, 1866 is not sufficiently designated by said section in order for the Court to determine just what act of 1866 was referred to.

(b) That the reference of Section 23 of said act of March 3, 1871, to the act of 1866 is too indefinite and uncertain.

54. The Court erred in holding that the defendants, the Southern Pacific Railroad Company of Cali-

fornia, the Southern Pacific Railroad Company, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Central Trust Company, the Equitable Trust Company, the Southern Pacific Land Company and the [32] California Land & Water Company, individually or collectively, or any or either of them, were not bound by all of the terms and conditions or the whole of the act of Congress of March 3, 1871.

55. The Court erred in not holding that the defendants, the Southern Pacific Railroad Company of California, the Southern *Southern* Pacific Railroad Company, the Southern Pacific Company, The Imperial Valley Lands Association, the Central Trust Company, The Equitable Trust Company, the Southern Pacific Land Company, and the California Land & Water Company, individually or collectively, or any or either of them, took said grant with all the "rights, grants and privileges, and subject to all of the limitations, restrictions and conditions" of the act of March 3, 1871, as well as any limitations, restrictions and conditions contained in the act of July 27, 1866.

56. The Court erred in not holding that the proviso in respect to the settlement and pre-emption of said lands, as provided in said act of March 3, 1871, was a question in the case requiring judicial interpretation, construction and determination.

57. The Court erred in not holding that there was jurisdiction in the court on the equity side of the subject matter of this suit.

58. The Court erred in not holding that there was

jurisdiction in the court on the equity side to enforce a specific performance for a breach of the condition in said proviso of said act of March 3, 1871.

59. The Court erred in not holding that there was jurisdiction in the court on the equity side to enforce a specific performance for a breach of an assumed conditional limitation in the proviso of said act of March 3, 1871.

60. The Court erred in not holding that the complainant, being eligible to make settlement and pre-empt public lands, had a right to enforce specific performance of contract from the defendants, The Southern Pacific Railroad Company of California or any of the defendants claiming an interest in it, or claiming by, through or under it, upon payment to them of $2.50 per acre. **[33]**

61. The Court erred in sustaining the motion to dismiss of the defendants, the Southern Pacific Railroad Company of California, The Southern Pacific Railroad Company, The Southern Pacific Company, the Imperial Valley Farm Lands Association, The Central Trust Company, the Equitable Trust Company, The Southern Pacific Land Company and the California Land & Water Company, and directing a decree dismisisng the complainant's amended bill, together with their costs.

62. The Court erred in holding that the said proviso of said act of March 3, 1871, or any act amendatory thereof touching settlement and pre-emption of said land as therein provided, in anywise or at all, did not refer to and affect the title to the said lands or any part thereof.

63. The Court erred in holding that the primary and controlling object of Congress of the act of March 3, 1871, and any acts amendatory thereof, was not to provide for the sale of the granted lands to citizens eligible to make settlement and pre-emption as provided in said act.

64. The Court erred in holding that the proviso for the sale of the lands granted to citizens eligible to make settlement and pre-emption upon public lands, etc., as contained in the act of March 3, 1871, and the acts amendatory thereof, were not binding laws and contracts upon the defendants and each and all of them.

65. The Court erred in not holding that the defendant, the Southern Pacific Railroad Company of California, and its sucessors in interest, and the defendants, the Southern Pacific Railroad Company, The Southern Pacific Company, the Imperial Valley Farm Lands Association, The Central Trust Company, The Equitable Trust Company, The Southern Pacific Land Company and the California Land & Water Company, and any or either of them, under said land grant of the act of March 3, 1871, in any event, were required to sell all the lands not otherwise sold or disposed of within three years after the completion of the entire road, etc., to citizens [34] eligible to make settlement and pre-emption of public lands.

66. The Court erred in not holding that the proviso in the act of March 3, 1871, and the acts amendatory thereof were operative and enforceable laws and contracts and required the defendants to sell said

lands to persons only eligible to make settlement and pre-emption in such quantities as is provided by law for the distribution of the public land and at a price not to exceed an average of $2.50 per acre, and that it prohibited them or either or any of them as to all lands remaining unsold three years after the completion of the entire road, to sell to persons other than those eligible to make settlement and pre-emption upon public lands.

67. The Court erred in not holding that Congress had waived all of the preliminary steps necessary for actual settlers to take in order to acquire a right in the public domain except that of paying to the defendants the purchase price for said land not to exceed an average of $2.50 per acre.

68. The Court erred in not holding that the defendant, the Southern Pacific Railroad Company of California, and the other defendants claiming an interest in said lands or claiming by, through or under it, had violated the law and every contract they had entered into when they accepted said grant under the act of March 3, 1871, by refusing to accept the tender made to them by complainant, and conveying to him the land described in his amended bill.

69. The Court erred in not holding that the defendant, the Southern Pacific Railroad Company of California, and the other defendants claiming an interest in said land or claiming by, through or under it, had violated said law and contract which they entered into when they accepted said grant under the act of March 3, 1871, and had thereby defeated the primary object, purpose, intent, and settled policy

of Congress in regard to public lands involved in these land grants and especially in this one. [35]

70. The Court erred in not holding that the defendant, the Southern Pacific Railroad Company of California, and the defendants claiming an interest in said lands so granted or any of the defendants claiming by, through or under it, had waived their right to fix a price upon said lands other than an average of $2.50 per acre and should be compelled to convey the same upon payment to them of the maximum price of $2.50 per acre by this complainant.

71. The Court erred in not holding that Congress has the absolute control over the settlement, sale and distrubution of the public lands and that it has the power to waive any and all of the preliminary steps that might be required to be taken to initiate on the part of a settler or pre-emptor, a vested right to public lands, and that it did, under the terms and conditions of the act of March 3, 1871, waive all of the preliminary steps and conditions required of settlers and pre-emptors to be done, except that they must be eligible to take public lands and must pay the defendants the purchase price, and that upon the happening of these two conditions, the equitable title to the land became vested in the complainant or settler.

72. The Court erred in sustaining the defendants and each of their motions to dismiss and directing that the complainant's bill be dismissed without leave to amend.

73. The Court erred in sustaining the defendants and each of their motions to dismiss the complainant's bill and in not directing that said complainant

be permitted to amend his bill within a time fixed by the Court, or that the same should be dismissed.

WHEREFORE, the complainant prays that the said decree be reversed.

J. MACK LOVE,
Attorney for Complainant and Appellant.
738 H. W. Hellman Bldg., Los Angeles, California.

[36]

[Endorsed]: No. A-103. United States District Court, Southern District of California, Southern Division. Geo. S. Fullinwider vs. Southern Pacific, et al. Assignment of Errors. Filed May 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. J. Mack Love, Attorney at Law, 738-739 H. W. Hellman Building, Los Angeles, Telephone F. 5021, Attorney for Complainant. [37]

In the United States District Court, in and for the Southern District of California, Southern Division.

No. A-103—IN EQUITY.

GEO. S. FULLINWIDER,
Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO,

a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE EQUITABLE TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California; THE CALIFORNIA LAND & WATER COMPANY, a Corporation of California, and the IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California,

Defendants.

Petition for Appeal.

The above-named complainant, conceiving himself aggrieved by the decree made and entered on the 26th day of April, 1915, in the above-entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

J. MACK LOVE,

Attorney for Complainant and Appellant,

738 H. W. Hellman Bldg., Los Angeles, California. [38]

Los Angeles, California, May 16, 1915.

And now, to wit, on the 16th day of May, 1915, it is

ordered that the above and foregoing appeal be allowed as prayed for.

BLEDSOE,
United States District Judge.

[Endorsed]: No. A–103. United States District Court, Southern District of California, Southern Division. Geo. S. Fullinwider vs. Southern Pacific, et al. Petition for Appeal. Filed May 13, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. J. Mack Love, Attorney at Law, 738–739 H. W. Hellman Building, Los Angeles, Telephone F 5021, Attorney for Complainant. Eq. O. B. [39]

In the District Court of the United States in and for the Southern District of California, Southern Division.

GEO. S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE EQUITABLE

TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California; THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California; and THE CALIFORNIA LAND & WATER COMPANY, a Corporation,

Defendants.

Undertaking for Costs on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Geo. S. Fullinwider, as Principal, and National Surety Company, as Surety, are held and firmly bound to the above-named defendants in the sum of Two Hundred Fifty ($250) Dollars, lawful money of the United States, well and truly to be paid.

THE CONDITION of the above obligation is such that,

WHEREAS, the said Geo. S. Fullinwider has appealed to the United States Circuit Court of Appeals from the judgment and order of the Court entered in this case on the 5th day of April, 1915, dismissing his case; [40]

NOW, THEREFORE, if the said Geo. S. Fullinwider pays all costs and damages that may accrue and be taxed against him on said appeal, not exceeding Two Hundred Fifty ($250) Dollars, in favor of the defendants, then this obligation to be void, otherwise to be and remain in full force and effect.

SEALED AND DATED at Los Angeles, Cali-

fornia, this 21st day of May, 1915.

GEORGE S. FULLINWIDER.
By J. MACK LOVE,
His Atty.

NATIONAL SURETY COMPANY.
Per CHAS. SEYLER, Jr., (Seal)
Attorney in Fact.

State of California,
County of Los Angeles,—ss.

On this 21st day of May, A. D. 1915, before me, Hazel Jones, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Chas. Seyler, Jr., known to me to be the person whose name is subscribed to the within instrument, as the Attorney in Fact of National Surety Co. and acknowledged to me that he subscribed the name of National Surety Co. thereto as surety, and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] HAZEL JONES,
Notary Public in and for said County and State.

[41]

[Endorsed]: A 103 Eq. Geo. S. Fullinwider, Plaintiff, vs. Southern Pacific R. R. Company et al., Defendants. Cost Bond. Filed May 24, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk.

This bond approved this 22d day of May, 1915.

BLEDSOE,
Judge U. S. District *Judge.* [42]

In the United States District Court in and for the Southern District of California, Southern Division.

No. A-103—IN EQUITY.

GEO. S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, THE EQUITABLE TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE CALIFORNIA LAND & WATER COMPANY, a Corporation; THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California, and THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California,

Defendants.

Praecipe [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please make a transcript of the following papers and records in this case for the Circuit Court of Appeals:

A copy of the amended petition with the date of its filing; a copy of the motion to dismiss filed by the defendants, the Southern Pacific Railroad Company of California, a Corporation, The Southern Pacific Company and the Imperial Farm Lands Association, a Corporation of California, together with the date of its filing; a memorandum that the other defendants filed a similar motion and the date when all of said motions were filed; a copy of all of the appeal papers, including the petition for an appeal, together with the Judge's order granting the appeal, the praecipe for the transcript, the citation, the cost bond for appealing and the decree of the Court entered in this case, showing the dates on all of the [43] papers when filed, and the date when the decree was entered, omitting the caption from all of the papers except the amended petition.

J. MACK LOVE,
Attorney for Complainant and Appellant.

We hereby acknowledge service of a copy of the within and foregoing praecipe upon us, as attorneys for the undersigned defendants this 24 day of May, 1915.

CHAS. R. LEWERS and
W. I. GILBERT,
Attorneys for The Southern Pacific Railroad Company of California, The Southern Pacific Railroad Company, The Southern Pacific Co., The Southern Pacific Land Company, The Imperial Valley Farm Lands Association, The Central Trust Company and The Equitable Trust Company.

I hereby acknowledge service of a copy of the within and foregoing praecipe upon me, as attorney for the defendant, the California Land & Water Company, this 24th day of May, 1915.

LUTHER G. BROWN,
Attorney for the California Land & Water Company.

[Endorsed]: No. A–103. United States District Court, Southern District of California, Southern Division. Geo. S. Fullinwider, vs. Southern Pacific Company et al. Praecipe. Filed May 24, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. J. Mack Love, Attorney at Law, 738, 739 H. W. Hellman Building, Los Angeles. Telephone F 5021, Attorney for Complainant. [44]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. A–103—EQUITY.

GEORGE S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTH-

ERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation; THE EQUITABYE TRUST COMPANY OF NEW YORK, a Corporation; THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California; THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California, and THE CALIFORNIA LAND & WATER COMPANY, a Corporation,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States, in and for the Southern District of California, do hereby certify the foregoing forty-four (44) typewritten pages, numbered from 1 to 44 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Record of Enrollment, Citation on Appeal, Amended Bill of Complaint, Motion [45] to Dismiss, filed by defendants, the Southern Pacific Railroad Company of California, a Corporation, The Southern Pacific Company and The Imperial Valley Farm Lands Association, a corporation of California, Decree, Assignments of Error, Petition for and Order Allowing Appeal, Bond on Appeal, and Praecipe for Transcript of Record on Appeal, in the above and therein entitled cause, and that the same constitute the record in said cause as specified in the said Praecipe for Transcript on Appeal, filed in my office on behalf of the appellant by his solicitor of record;

I do further certify that the cost of the foregoing record is $21.60/100, the amount whereof has been paid me by George S. Fullinwider, the appellant in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 10th day of August, in the year of our Lord one thousand nine hundred and fifteen, and of our Independence the one hundred and fortieth.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States, in and for the Southern District of California.
By Chas. N. Williams,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled 8/10/15. C. N. W.] [46]

[Endorsed]: No. 2638. United States Circuit Court of Appeals for the Ninth Circuit. George S. Fullinwider, Appellant, vs. The Southern Pacific Railroad Company of California, a Corporation, The Southern Pacific Company, a Corporation, The Southern Pacific Railroad Company, a Corporation, The Imperial Valley Farm Lands Association, a Corporation, The Central Trust Company of New York, a Corporation, The Equitable Trust Company of New York, a Corporation, The Southern Pacific Land Company, a Corporation and the California Land & Water Company, a Corporation, Appellees.

Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed August 20, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

Order Allowing Appellant 60 Days' Additional Time to File Transcript on Appeal.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

GEO. S. FULLINWIDER,
Complainant and Appellant,
vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation; THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated; THE CENTRAL TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE EQUITABLE TRUST COMPANY OF NEW YORK, STATE OF NEW YORK, a Corporation; THE SOUTHERN PACIFIC LAND COM-

PANY, a Corporation of California; THE CALIFORNIA LAND & WATER COMPANY, a Corporation of California, and THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California,

Defendants and Appellees.

Good cause appearing therefor, it is hereby ordered that the appellant, Geo. S. Fullinwider, have sixty (60) days additional and further time within which to file his Transcript on appeal in the above-entitled suit, with the clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit.

Dated at Los Angeles, June 17th, 1915.

BLEDSOE, J.,
United States District Judge.

[Endorsed]: No. 2638. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time 60 Days' Additional Time to File Record Thereof and to Docket Case. Filed Aug. 20, 1915. F. D. Monckton, Clerk.

[Endorsed]: Printed Transcript of Record. Filed Sept. 2, 1915. F. D. Monckton, Clerk.

No. 2638

United States

Circuit Court of Appeals

For the Ninth Circuit.

GEORGE S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, THE SOUTHERN PACIFIC COMPANY, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation, THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, a Corporation, THE SOUTHERN PACIFIC LAND COMPANY, a Corporation, and THE CALIFORNIA LAND & WATER COMPANY, a Corporation,

Appellees.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable FRANK H. RUDKIN, District Judge.

No. 2638.

GEORGE S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA et al.,

Appellees.

Order of Submission.

ORDERED, appeal in the above-entitled cause argued by Mr. J. Mack Love, counsel for the appellant, and by Mr. Guy V. Shoup, counsel for the appellees, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventh day of February, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN DECREES AND JUDGMENTS.

By the direction of the Honorable William B. Gilbert and Erskine M. Ross, Circuit Judges, and the Honorable Frank H. Rudkin, District Judge, before whom the cases were heard, ORDERED, that the typewritten Opinion this day rendered by the Court in each of the following entitled causes be forthwith filed by the clerk, and that a decree or judgment be filed, and recorded in the Minutes of this Court, in each of the causes in accordance with the opinion filed therein: * * * George S. Fullinwider, Appellant, vs. The Southern Pacific Railroad Company of California et al., Appellees, No. 2638, * * *

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 2638.

GEORGE S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA et al.,

Appellees.

Opinion U. S. Circuit Court of Appeals.

J. MACK LOVE, for the Appellant.

CHAS. R. LEWERS, W. I. GILBERT, LUTHER G. BROWN and GUY V. SHOUP, for the Appellees.

Before GILBERT and ROSS, Circuit Judges, and RUDKIN, District Judge.

GILBERT, Circuit Judge:

The appellant brought a suit to compel the appellees to convey to him a certain half section of land situated within the limits of the Congressional grant made to the Southern Pacific Railroad Company of California, by the Act of March 3, 1871 (16 Stat. 573). The complaint alleged that the appellant tendered the Railroad Company $2.50 an acre for the land, and demanded a conveyance of the same, but the conveyance was refused. From the final decree of the Court below dismissing the bill for want of equity, the present appeal is taken.

The Act of March 3, 1871, contained a grant of

lands to two railroad companies, first to the Texas Pacific Railroad Company, which was incorporated by the Act, and, second, to the Southern Pacific Railroad Company of California, a corporation, which had received a prior land grant in 1866. The main purpose of the Act was to aid the Texas Pacific Company in the construction of a railroad from the eastern line of Texas, through El Paso and Yuma, to ship's channel in the Bay of San Diego. At the end of the Act, and in section 23 thereof, is found the grant to the Southern Pacific Railroad Company of California, in words as follows: "That, for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California, by the Act of July twenty-seventh, eighteen hundred sixty-six; Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company." The appellant predicates his cause of action upon the provisions of section 9 of the Act, whereby there was imposed upon the grant to the Texas Pacific Railroad Company the following condition: "And provided further

that all such lands so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of $2.50 per acre for all the lands herein granted." There is no similar provision in the grant to the Southern Pacific Railroad Company of California, but the appellant contends that in section 23, which authorizes the construction of a railroad by the Southern Pacific Railroad Company of California, the intention of Congress is expressed to impose upon that company the same limitations and conditions that were imposed by section 9 upon the Texas Pacific Railroad Company, and that that intention is evidenced by the use of the words "with the same rights, grants and privileges," and that Congress thereby intended that the rights, grants and privileges given to the Southern Pacific Company were to be the same as those given to the Texas Pacific Company, and thus attached to the grant the conditions contained in section 9; and the appellant contends that the words which immediately follow that clause, "and subject to the same limitations, restrictions and conditions," are to be severed therefrom and associated with a wholly different subject matter, to wit, the grant to the Southern Pacific Company by the Act of Congress of July 27, 1866. We are unable to understand the ratiocination by which such a conclusion is reached. Section 23 is plain, clear and unambigu-

ous, and leaves no room for construction, and there is no room to doubt that Congress thereby granted lands to the appellee with the same rights, grants and privileges, subject to the same limitations, restrictions and conditions as were the lands granted by it to the same company by the Act of July 27, 1866.

We find no merit in the contention that the conditions specified in section 9 should be read into section 23, for the reason that such provisions were uniformly inserted in the grants which Congress had made in aid of the construction of railroads, in the two or three years which preceded the date of the grant in question, and that those grants and this should be construed *in pari materia.* Statutes are *in pari materia* which relate to the same person or things, or to the same class of persons or things. Those various railroad grants were not *in pari materia.* They did not relate to the same persons or things, or to the same class of persons or things. Each grant was distinct in itself, and each grantee was distinct from the others. The grantee of one of those grants, in order to ascertain the nature of the rights and privileges conferred upon it, was not bound to refer to any other grant or Act of Congress. Again, the rule of *pari materia* is a rule of construction only, and is resorted to for its assistance in determining the meaning of a doubtful statute. It has no application where the language of the statute is, as in the present instance, clear and unambiguous.

The decree is affirmed.

[Endorsed]: Opinion. Filed Feb. 7, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2638.

GEORGE S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, THE SOUTHERN PACIFIC COMPANY, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation, THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, a Corporation, and THE CALIFORNIA LAND & WATER COMPANY, a Corporation,

Appellees.

Decree U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Southern Division and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged and decreed by this Court that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered Feb. 7, 1916. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2638.

GEO. S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated, THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, State

of New York, a Corporation, THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California, THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California, and the CALIFORNIA LAND & WATER COMPANY, a Corporation,

Appellees.

Petition for and Order Allowing Appeal to Supreme Court U. S.

The above-mentioned appellant, Geo. S. Fullinwider, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment has herein been rendered on the 7th day of February, 1916, affirming the decree of the District Court of the United States, for the Southern District of California, Southern Division, and that the matter in controversy in said suit exceeds $1,000, besides cost, and involves the construction of the United States statutes. That this cause is one in which the United States Circuit Court of Appeals for the Ninth Circuit has no final jurisdiction, and that it is a proper case to be reviewed by the Supreme Court of the United States on appeal.

WHEREFORE, the said appellant prays that an appeal be allowed him in the above-entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained

of in the Assignment of Errors herein filed by said appellant may be reviewed and, if error be found, corrected according to the laws and customs of the United States.

J. MACK LOVE,
Attorney for Appellant.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2638.

GEO. S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, et al.,

Appellees.

Order Allowing Appeal.

It is hereby ordered that the appeal in the above-entitled cause to the Supreme Court of the United States be, and is hereby allowed, as prayed, and the appeal bond fixed at $500.

ERSKINE M. ROSS,
U. S. Circuit Judge, 9th Circuit.

Jany. 12, 1917.

[Endorsed]: Petition for and Order Allowing Appeal to Supreme Court U. S. Filed Jan. 10, 1917. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2638.

GEO. S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated, THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York, a Corporation, THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California, THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California, and the CALIFORNIA LAND & WATER COMPANY, a Corporation,

Appellees.

Assignment of Errors.

Comes now George S. Fullinwider, appellant, by his counsel, J. Mack Love, and respectfully represents that he feels himself to be aggrieved by the pro-

ceedings and decree of the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled action, filed in said Court on the 7th day of February, 1916, and assigns error thereto, as follows:

1. Said Court erred in affirming the judgment and decree entered by the District Court of the United States in and for the Southern District of California, Southern Division.

2. The Court erred in not setting aside and reversing the judgment of the District Court of the United States in said matter.

3. The Court erred in not granting to said appellant the relief prayed for by him in his said amended bill.

4. The Court erred in not holding that the proviso in Section 9 of the act of Congress of March 3, 1871, was a conditional limitation. Said proviso in section 9 of said act is as follows:

> "That all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

5. The Court erred in holding that there was not jurisdiction in the court on the equity side to enforce a specific performance of said contract on behalf of the appellant upon the happening of the conditions subsequent in said proviso of section 9 of said act of

Congress of March 3, 1871.

6. The Court erred in not holding that the proviso in section 9 of the act of March 3, 1871, providing "That said lands not sold or otherwise disposed of within three years after the completion of the entire road should be subject to settlement and pre-emption like other lands," was sufficiently definite to be enforced as a conditional limitation.

7. The Court erred in not holding that the proviso in section 9 of the act of March 3, 1871, was a binding contract upon the defendants and each of them, by which they and each of them were obligated to convey all interest they had in said land described in complainant's amended bill, upon the payment by the complainant to them or to whichever one of the defendants the Court should direct the same should be paid to, of $2.50 per acre.

8. The Court erred in not holding that the proviso in section 9 of the act of March 3, 1871, applied to and was binding upon the defendants and every one of them.

9. The Court erred in not holding that the proviso in section 9 of the act of March 3, 1871, was designed to devote said lands conveyed by said grants "that had not been sold or otherwise disposed of by the defendants within three years after the completion of the entire road" to settlement and to prevent the monopoly of said lands. That said grant was a law as well as a grant, that said defendants could not defeat the purpose of the proviso requiring sales to settlers and pre-emptors, by themselves monopolizing and holding the lands and by refusing

to sell at all or by refusing to sell any of them except to such persons and in such quantities and at such prices as they or either of them saw fit.

10. The Court erred in holding that the proviso in section 9 of the act of Congress of March 3, 1871, was not a conditional limitation, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the defendants, or either of them, to accept and become vested with the title to the lands under the grant of March 3, 1871.

11. The Court erred in refusing to enter a decree of specific performance on behalf of Geo. S. Fullinwider, the appellant herein, and against the defendants and appellees, the Southern Pacific Railroad Company of California and each and every one of the other defendants, claiming an interest in said lands or claiming by, through or under it, requiring said defendants to convey to the appellant the lands sought to be purchased by him, upon payment to them of the purchase price therefor, or $2.50 per acre.

12. The Court erred in holding that the defendants, by the provisions of said grant contained, did not take in all lands still held by them under said grant which had not been sold or otherwise disposed of as provided, etc., a conditional limitation estate therein for the use and benefit of the complainant.

(a) The nature and quality of said interest in said grant are sufficiently specific and definite.

(b) The application to purchase, and tender of payment and being eligible to make settlement and

pre-emption on public lands is a sufficient identification.

13. In case the Court should have been of the opinion that said conditions did not create a conditional limitation estate, then the Court erred in not holding that the defendant the Southern Pacific Railroad Company of California and each and every of the defendants claiming an interest in said lands or claiming an interest by, through or under it, took the titles to said lands in trust for this appellant and other settlers eligible to settle and pre-empt public lands and who brought themselves within the provisions of said act, and upon said appellant or any other such settlers paying to the said defendant or defendants the $2.50 per acre, they would be compelled to convey said lands to the appellant or such settlers.

14. The Court erred in holding that the appellant did not have a vested interest in the land sought to be purchased by him, by reason of his offer and tender to purchase the land upon the terms provided in the act of March 3, 1871.

15. The Court erred in not holding that said proviso in section 9 of the act of March 3, 1871, is enforceable by the appellant.

16. The Court erred in not holding that it was impossible for the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, The Imperial Valley Farm Lands Association, The Central Trust Company, the Equitable Trust Company and the California Land & Water Com-

pany, or any or either of them, to receive said grant with the same "rights, grants and privileges" as those contained in the act of July 27, 1866, for the reason that the time within which they were required to perform the conditions of sections 8 or 12 of said act were not extended.

17. The Court erred in holding that under section 23 of the act of March 3, 1871, the Southern Pacific Company took said grant under the act of July 27, 1866.

(a) That said act of July 27, 1866, is not sufficiently designated by said section in order for the Court to determine just what act of 1866 was referred to.

(b) That the reference of section 23 of said act of March 3, 1871, to the act of 1866 is too indefinite and uncertain.

18. The Court erred in holding that the said proviso of said act of March 3, 1871, or any act amendatory thereof touching *touching* settlement and pre-emption of said land as therein provided, in any wise or at all, did not refer to and affect the title to the said lands or any part thereof.

19. The Court erred in holding that the primary and controlling object of Congress of the act of March 3, 1871, and any acts amendatory thereof, was not to provide for the sale of the granted lands to citizens eligible to make settlement and pre-emption as provided in said act.

20. The Court erred in not holding that the defendant, the Southern Pacific Railroad Company of California, and the other defendants claiming an in-

terest in said land, or claiming by, through or under it, had violated said law and contract which they entered into when they accepted said grant under the act of March 3, 1871, and had thereby defeated the primary object, purpose, intent and settled policy of Congress in regard to public lands involved in these land grants and especially in this one.

21. The Court erred in not holding that the defendant, the Southern Pacific Railroad Company of California, and the defendants claiming an interest in said lands so granted or any of the defendants claiming by, through or under it, had waived their right to fix a price upon said lands other than an average of $2.50 per acre, and should be compelled to convey the same upon payment to them of the maximum price of $2.50 per acre by this appellant.

WHEREFORE the appellant prays that said judgment and decree of said Circuit Court of Appeals may be reversed in all things.

J. MACK LOVE,
Attorney for Appellant.

[Endorsed]: Assignment of Errors. Filed Jan. 10, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Circuit.

GEO. S. FULLINWIDER,

Complainant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated, THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York, a Corporation, THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California, THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of California, and THE CALIFORNIA LAND & WATER COMPANY, a Corporation,

Defendants.

Bond on Appeal to Supreme Court U. S.

KNOW ALL MEN BY THESE PRESENTS: That we, Geo. S. Fullinwider, as principal, and National Surety Company, as surety, are held and firmly bound to the above-named defendants in the sum of Five Hundred ($500.00) Dollars, lawful

money of the United States of America, well and truly to be paid.

The condition of the above obligation is such that,

WHEREAS, the said Geo. S. Fullinwider has appealed to the United States Supreme Court from the judgment and order of the Court entered in this case on the 7th day of February, 1915, affirming the judgment of the United States District Court in said case.

NOW, THEREFORE, if the said Geo. S. Fullinwider pays all costs and damages that may accrue and be fixed against him on said appeal, not exceeding Five Hundred ($500.00) Dollars, in favor of the defendants, then this obligation to be void, otherwise to be and remain in full force and effect.

Sealed and dated at Los Angeles, California, this 12th day of January, A. D. 1917.

GEORGE S. FULLINWIDER,
By J. MACK LOVE,
His Atty.

NATIONAL SURETY COMPANY,
[Seal] By CHAS. SEYLER, JR.,
Its Attorney in Fact.

State of California,
County of Los Angeles,—ss.

On this 12th day of January, A. D. 1917, before me, Hazel Jones, a notary public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Chas. Seyler, Jr., known to me to be the attorney in fact of the National Surety Company, the corporation that executed the within instrument, known to me to be the

person who executed the within instrument, on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] HAZEL JONES,
Notary Public in and for said County and State.

The within bond approved this 13th day of January, A. D. 1917.

ERSKINE M. ROSS,
Judge U. S. Circuit Court of Appeals, Ninth Circuit.

[Endorsed]: Bond on Appeal to Supreme Court, U. S. Filed Jan. 16, 1917. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2638.

GEO. S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, et al.,

Appellees.

Praecipe for Transcript of Record on Appeal to Supreme Court U. S.

To the Clerk of the Said Court:

Sir: Please make and furnish us with a certified printed transcript of the record (including the proceedings had in said Circuit Court of Appeals) in

accordance with the rules of the Supreme Court of the United States and not less than thirty (30) uncertified copies thereof for use on appeal to the Supreme Court of the United States in the above-entitled cause, the said transcript to consist of a copy of the following:

1. Printed transcript of record on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz.,

2. Order of Submission entered October 6, 1915.

3. Order Directing Filing of the Opinion, etc., entered February 7, 1916.

4. Opinion, filed February 7, 1916.

5. Decree, filed and entered February 7, 1916.

6. Petition for Allowance of Appeal to Supreme Court of the United States, filed Jany. 10, 1917.

7. Assignment of Errors on said appeal, filed Jany. 10, 1917.

8. Order Allowing Appeal to Supreme Court of United States and Fixing Amount of Bond, filed Jan. 10, 1917.

9. Bond on said appeal filed Jan. 16, 1917.

10. Citation on said appeal, filed Jan. 16, 1917.

11. Praecipe for record on said appeal, filed Jan. 16, 1917.

Please prepare the thirty or more uncertified printed copies of said record, by printing thirty or more copies of the above-mentioned proceedings that were had and papers that were filed in said

cause in said Circuit Court of Appeals, and by binding one of the latter printed copies of said proceedings at the end of each of the thirty or more extra printed transcript of record, on which said cause was heard in said Circuit Court of Appeals.

J. MACK LOVE,
Attorney for Appellant.

We hereby acknowledge service of a copy of the within and foregoing praecipe upon us, as attorneys for the undersigned defendants, this 13 day of January, 1917.

CHAS. R. LEWERS,
W. I. GILBERT,
Attorneys for The Southern Pacific Railroad Company of California, The Southern Pacific Railroad Company, The Southern Pacific Co., The Southern Pacific Land Company, The Imperial Valley Farm Lands Association, The Central Trust Company and The Equitable Trust Co.

I hereby acknowledge service of a copy of the within and foregoing praecipe upon me, as attorney for the defendant, the California Land & Water Company, this 13 day of January, 1917.

LUTHER G. BROWN,
Attorney for the California Land & Water Co.

[Endorsed]: Praecipe for Transcript of Record on Appeal to Supreme Court U. S. Filed Jan. 16, 1917. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2638.

GEORGE S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, et al.,

Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record Upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-two (72) pages, numbered from and including 1 to and including 72, to be a true copy of the entire record in the above-entitled cause, made pursuant to praecipe filed by counsel for the appellant on the 16th day of January, A. D. 1917, under rule 8 of the Supreme Court of the United States, including the Assignment of Errors, and of all proceedings had, and of all papers, including the opinion filed in the said Circuit Court of Appeals, as the originals thereof remain on file and appear of record in my office, and that the record, assignment of errors, proceedings and papers contained within said papers constitute the Transcript of Record on the appeal taken by the appellant to the

Supreme Court of the United States in the above-entitled cause, as made up and certified pursuant to the said praecipe.

ATTEST my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of January, A. D. 1917.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2638.

GEORGE S. FULLINWIDER,

Appellant,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF ARIZONA, a Corporation, THE SOUTHERN PACIFIC RAILROAD COMPANY OF NEW MEXICO, a Corporation, Consolidated, THE CENTRAL TRUST COMPANY OF NEW YORK, State of New York, a Corporation, THE EQUITABLE TRUST COMPANY OF NEW YORK, State of New York, a Corporation, THE SOUTHERN PACIFIC LAND COMPANY, a Corporation of California, THE IMPERIAL VALLEY FARM LANDS ASSOCIATION, a Corporation of CALIFORNIA, and the CALIFORNIA LAND & WATER COMPANY, a Corporation,

Appellees.

Citation on Appeal to Supreme Court U. S.

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, sixty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Geo. S. Fullinwider is appellant and you are appellees, to show cause, if any there be, why the decree rendered against said appellant, as in such appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable ERSKINE M. ROSS, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 13 day of January, A. D. 1917.

ERSKINE M. ROSS,
Judge U. S. Circuit Court of Appeals, Ninth Circuit.

Now, we hereby, this 13 day of January, 1917, accept due personal service of this citation on behalf of the Southern Pacific Railroad Company, the Southern Pacific Railroad Company of California, the Southern Pacific Company, the Imperial Valley Farm Lands Association, the Southern Pacific Land Company, the Central Trust Company, and the Equitable Trust Company, appellees.

CHAS. R. LEWERS and
W. I. GILBERT,
Attys. for Above-named Defendants and Appellees.

Now, I hereby, this 13 day of January, 1917, accept due personal service of this citation on behalf of the California Land & Water Company, appellee.

LUTHER G. BROWN,

Atty. for Above-named Defendant and Appellee.

[Endorsed]: Citation on Appeal to Supreme Court, U. S. Filed Jan. 16, 1917. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

INDEX.

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1916.

No. 918.

George S. Fullinwider,
Appellant,

vs.

The Southern Pacific Railroad Company of California, et al.,
Appellees.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from the decision of the U. S. Circuit Court of Appeals, affirming a decision of the U. S. District Court for the Southern District of California, Southern Division, sustaining the defendants' motion to dismiss the plaintiff's cause of action and bill of complaint, and entering judgment accordingly.

The sole and only proposition involved in this appeal is, the construction of the acts of

Congress of March 3, 1871 (16 S. at L. 573) and May 2, 1872 (17 S. at L. 59) and July 27, 1866 (14 S. at L. 292).

The Act of July 27, 1866, was an act incorporating the Atlantic & Pacific Railroad Company, and to aid in the construction of its road, and contained the usual provisions that were incorporated in all of these acts of Congress making grants to aid in the construction of their roads up to that date.

The Act of March 3rd, 1871, and the act supplementary thereto of May 2, 1872, were acts incorporating the Texas & Pacific Railroad Company and to aid in the construction of its railroad, with the usual terms and conditions that were incorporated in all of the railroad grants from 1866 up to this date. This act was the last one in which a land grant was made by Congress in aid of railroads.

The question involved in this action is the construction of sections 9 and 23 of the Act of March 3, 1871. Section 9 of said act is as follows [Record p. 7]:

> "That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per

mile, on each side of said railroad line, as such line may be adopted by said company, through the territories of the United States, and ten alternate sections per mile on each side of said railroad in Califorina, where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If in the too near approach of the said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections nearest the line of said railroad may be selected as above provided; and the word 'mineral' where it occurs in this act shall not be held to include iron or coal: Provided, however, that no public lands are hereby granted within the state of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the land originally granted. The term 'ships channel,' as used in this bill, shall not be construed as conveying any

greater right to said company to the water front of San Diego bay than it may acquire by gift, grant, purchase or otherwise, except the right of way, as herein granted. And provided further, that all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

Section 23 of said act is as follows:

"That for the purpose of connecting the Texas and Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California (subject to the laws of California) is hereby authorized to construct a line of railroad from a point at or near Tehachapi Pass by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California, by the Act of July twenty-seven, eighteen hundred and sixty-six, provided, however, that this section shall in no way affect or impair the rights, present and prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

The crucial question being, whether section 23, above quoted, can be bodily segregated from

the Act of March 3, 1871, and relieved from all of the limitations fastened upon the grantee by section 9, above quoted, and take under the Act of July 27, 1866, which has no conditions or limitations in regard to the sale of said lands, or of the rights of actual settlers incorporated therein.

The appellant avers in his amended bill in equity after the usual formal allegations as to the character and corporate capacity of the defendants, substantially as follows:

That there was a grant to the defendant, the Southern Pacific Railroad Company of California, by the Act of Congress of March 3, 1871, under and by virtue of section 23 of said act, the following described tract of land, together with other lands, to-wit:

The south one-half of section five (5), township eleven (11) south, range fourteen (14) east, San Bernardino Base and Meridian, lying and situate in the county of Imperial and state of California.

The complainant further avers that said grant was made upon a condition and subject to the proviso contained in the latter part of section 9 of the Act of March 3, 1871, which was in words and figures as follows, to-wit:

> "And provided further, that all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act,

> within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all lands herein granted."

That said lands, the subject of this controversy, exceed in value the sum of three thousand dollars. [Record p. 11.]

The appellant in his amended bill asked the court:

I. That a construction and interpretation be made by it of said sections of said acts of Congress, and especially of sections 9 and 23 of the Act of Congress approved March 3, 1871, together with the supplementary act passed by Congress on May 2nd, 1872, and all other acts that have any relation to the application and construction of the Act of March 3, 1871.

II. That it be adjudged and ordered by the court that the appellees, upon the payment into court of the amount of eight hundred dollars, tendered to it for said land, be compelled to convey to the appellant all their right, title and interest in and to the lands hereinbefore described.

III. That the appellant have such other and further general relief as in equity and good conscience he is entitled to. [Record p. 7.]

The appellant, George S. Fullinwider, appeals from the judgment of the U. S. Circuit Court of Appeals affirming a judgment and decree of the U. S. District Court. [Record p. 38.]

Assignment of Errors.

The assignment of errors which appellant desires more particularly to urge in this court are as follows:

4. The court erred in not holding that the proviso in section 9 of the Act of Congress of March 3, 1871, was a conditional limitation. Said proviso in section 9 of said act is as follows:

> "That all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

5. The court erred in holding that there was not jurisdiction in the court on the equity side to enforce a specific performance of said contract on behalf of the appellant upon the happening of the conditions subsequent in said proviso of section 9 of said Act of Congress of March 3, 1871.

6. The court erred in not holding that the proviso in section 9 of the Act of March 3, 1871, providing "That said lands not sold or otherwise disposed of within three years after the completion of the entire road should be subject to settlement and pre-emption like other lands," was sufficiently definite to be enforced as a conditional limitation.

7. The court erred in not holding that the proviso in section 9 of the Act of March 3, 1871, was a binding contract upon the defendants and each of them, by which they and each of them were obligated to convey all interest they had in said land described in complainant's amended bill, upon the payment by the complainant to them or to whichever one of the defendants the court should direct the same should be paid to, of $2.50 per acre.

8. The court erred in not holding that the proviso in section 9 of the Act of March 3, 1871, applied to and was binding upon the defendants and every one of them.

9. The court erred in not holding that the proviso in section 9 of the Act of March 3, 1871, was designed to devote said lands conveyed by said grants, "that had not been sold or otherwise disposed of by the defendants within three years after the completion of the

entire road" to settlement and to prevent the monopoly of said lands. That said grant was a law as well as a grant, that said defendants could not defeat the purpose of the proviso requiring sales to settlers and pre-emptors, by themselves monopolizing and holding the lands and by refusing to sell at all or by refusing to sell any of them except to such persons and in such quantities and at such prices as they or either of them saw fit.

10. The court erred in holding that the proviso in section 9 of the Act of Congress of March 3, 1871, was not a conditional limitation, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the defendants, or either of them, to accept and become vested with the title to the lands under the grant of March 3, 1871.

11. The court erred in refusing to enter a decree of specific performance on behalf of Geo. S. Fullinwider, the appellant herein, and against the defendants and appellees, the Southern Pacific Railroad Company of California, and each and every one of the other defendants claiming an interest in said lands or claiming by, through or under it, requiring said defendants to convey to the appellant the lands sought to be purchased by him, upon the payment to

them of the purchase price therefor, of $2.50 per acre.

12. The court erred in holding that the defendants, by the provisions of said grant contained, did not take in all lands still held by them under said grant which had not been sold or otherwise disposed of as provided, etc., a conditional limitation estate therein for the use and benefit of the appellant.

(a) The nature and quality of said interest in said grant are sufficiently specific and definite.

(b) The application to purchase, and tender of payment and being eligible to make settlement and pre-emption on public lands is a sufficient identification.

13. In case the court should have been of the opinion that said conditions did not create a conditional limitation estate, then the court erred in not holding that the defendant the Southern Pacific Railroad Company of California and each and every of the defendants claiming an interest in said lands or claiming an interest by, through or under it, took the title to said lands in trust for this appellant and other settlers eligible to settle and pre-empt public lands and who brought themselves within the provisions of said act, and upon said appellant or any other such settlers paying to the said defendant or defendants the $2.50 per acre,

they would be compelled to convey said lands to the appellant or such settlers.

14. The court erred in holding that the appellant did not have a vested interest in the land sought to be purchased by him, by reason of his offer and tender to purchase the land upon the terms provided in the Act of March 3, 1871.

15. The court erred in not holding that said proviso in section 9 of the Act of March 3, 1871, is enforceable by the appellant.

16. The court erred in not holding that it was impossible for the defendants, the Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company, the Southern Pacific Company, The Imperial Valley Farm Lands Association, The Central Trust Company, the Equitable Trust Company and the California Land & Water Company, or any or either of them, to receive said grant with the same "rights, grants and privileges" as those contained in the Act of July 27, 1886, for the reason that the time within which they were required to perform the conditions of sections 8 or 12 of said act were not extended.

17. The court erred in holding that under section 23 of the Act of March 3, 1871, the Southern Pacific Company took said grant under the Act of July 27, 1866. [Record p. 62.]

The opinion of the U. S. Court of Appeals is brief, and is found in the Record [pages 53 to 56]. The questions involved are tersely, clearly and briefly stated in this opinion.

Errors Complained of in Decree of Court of Appeals.

The appellant complains that the Court of Appeals erred in segregating section 23 from the Act of March 3, 1871, and in construing it as independent of, and relieved from the conditions and limitations attached to the other sections, and parts of said act, and that it further erred in holding that said section 23, when construed in connection with the other sections and parts of said act, and the whole thereof, was not ambiguous and uncertain, and that what Congress intended and meant was doubtful, and that it was not then proper or necessary for the court to resort to the usual and ordinary rules of construction, which are relied upon when the laws are not plain, clear, certain and unambiguous.

The issues raised by the pleadings, and the opinion entered by the Court of Appeals, and the classification of the subject, would naturally be presented to the court under the following propositions:

I.

WAS THIS GRANT OF LANDS TO THE SOUTHERN PACIFIC RAILROAD COMPANY UNDER THE ACT OF MARCH 3, 1871, MADE SUBJECT TO THE RIGHTS, GRANTS AND PRIVILEGES OF SAID ACT, OR UNDER THE RIGHTS, GRANTS AND PRIVILEGES OF THE ACT OF JULY 27, 1866, AND SUBJECT ONLY TO ITS TERMS?

II.

IF THE DEFENDANTS TOOK THIS GRANT UNDER THE TERMS AND CONDITIONS OF THE ACT OF 1871, WHAT IS THE CHARACTER OF THE ESTATE THEY BECAME VESTED WITH?

III.

WHAT RIGHT WOULD THIS COMPLAINANT, WHO IS ELIGIBLE TO SETTLE AND PRE-EMPT PUBLIC LANDS, HAVE UNDER SAID ACT WHERE THE COMPANY HAD NOT SOLD OR OTHERWISE DISPOSED OF THE GRANTED LANDS WITHIN THREE YEARS AFTER THE COMPLETION OF ITS ENTIRE ROAD?

The first proposition is the only one necessary for this court to consider and pass upon, for, whatever ruling and judgment is made and entered upon it will dispose of the case in this court.

Brief and Argument of Appellant, George S. Fullinwider.

The amount involved in the suit of this appellant is not so much, but the construction the court places upon these statutes and the status and rights of the appellant and defendants under them are propositions that involve property worth many millions of dollars, between, perhaps, one and two million acres of land, much of it being land of great fertility and productiveness. For almost forty years the defendants have failed and refused to dispose of these lands to settlers at any price. The result has been that the improvement and development of these valleys, wherein these granted lands lie, has been obstructed and held back to the great damage and detriment of settlers who were anxious to settle upon and improve these lands and make their permanent homes there; to the great damage also to the state of California, within whose boundaries these lands lie, the settlement and improvement of which would add many desirable citizens to the state's population, add to her wealth by reducing to cultivation this vast area of valuable lands, and adding millions to her wealth in the way of reclaiming and increasing in value these waste desert lands, lastly depriving these defendants themselves of a perpetual asset which would grow in value yearly, by having this

country settled and improved by thrifty and industrious people who would be continual and perpetual patrons of the road, to the amount of millions of dollars annually.

It is the earnest desire of this appellant that the court pass upon the crucial proposition herein presented by the defendant's demurrer or motion to dismiss and construe the acts of Congress involved herein, and thereby determine the status and rights of the parties.

The importance of having any question as to the title of these lands forever put to rest is so great and of such public interest and concern that it seems to us that there should be no delay in attempting on the part of both the appellant and the defendants, of getting a full and careful hearing of these questions and have them carefully considered by the court and a final adjudication entered, clearly defining the rights and status of all of the parties hereto in such a way that these valuable possessions may be no longer held back for settlement and development.

The interests of the public, as well as of the parties to this litigation, it seems to us, urgently demand that a speedy and final determination and settlement of these titles should be adjudicated.

It is admitted by all parties and has been so adjudicated by the courts in a number of

cases, that the Southern Pacific Railroad Company took the grant of the lands involved in this controversy under the Act of March 3, 1871, and from no other source.

The following propositions are rudimentary, having been passed upon by the courts so many times, they have become rules of law of all of the courts of the country, and it is hardly necessary to cite authorities in support of them:

I.

In construing acts of Congress, the courts will ascertain, if possible, what the intent of Congress was in passing these laws, and when that intent is ascertained, it must be carried out and given effect by the court.

Justice Field, in the case of Winona & St. Peter Railroad Company v. Barney, 113 U. S. 625, in the opinion says that it is not always an easy matter to determine this intent and uses this language:

> "We must look, in order to ascertain this intent, to the condition of the country when the acts were passed, as well as the purpose declared on their face, and read all parts of them together."

II.

The rules of construction on these public land grant acts are, that they are to be construed as laws, and the rules which under com-

mon law control the construction of conveyances between private persons do not apply.

III.

These grants are all construed most strongly in favor of the government or the public and against the grantee.

As was well said in the case of Oregon and California R. R. Co. v. The United States, 238 U. S. 414, 59 L. Ed. 1388:

> "It is not necessary to review the cases cited respectively to sustain and oppose the contending arguments. The principles announced in the cases are rudimentary, and may be assumed to be known, and the final test of their application to be the intention of the grantor."

In support of these propositions, the following cases are cited:

Dubuque & Pacific R. R. v. Ritchfield, 64 U. S. 66, 16 L. Ed. 509;

Mills *et al.* v. County of St. Clair, 49 U. S., 12 L. Ed. 1207;

Leavenworth R. R. Co. v. U. S., 92 U. S. 740, 23 L. Ed. 638;

Wisconsin Central R. R. Co. v. Forsythe, 159 U. S. 55, 40 L. Ed. 74;

Mo. etc. Ry. Co. v. Kansas Pac., 97 U. S. 497, 24 L. Ed. 1095;

Sioux City etc. v. U. S., 159 U. S. 360, 40 L. Ed. 177;

Slidell v. Grandjean, 111 U. S. 437; 28 L. Ed. 321;
Knoxville Water Co. v. Knoxville, 200 U. S. 33, 50 L. Ed. 359;
Schullenberg v. Harriman, 88 U. S. 62, 22 L. Ed. 551;
Platt v. U. Pac. R. R. Co., 99 U. S. 58, 25 L. Ed. 424;
Barden v. Northern Pac. R. R., 154 U. S 325, 38 L. Ed. 992;
U. S. v. Oregon & Cal. R. R., 186 Fed. 892;
St. Paul M. & M. Ry. Co. v. Greenhalgh, 26 Fed. 568.

At the very threshhold of the discussion of the question involved here, it is best, in the interest of both time, and to save the labor and attention of this court, that it be determined, whether or not, the statutes challenged here leave any room for construction.

The contention of the appellees is, that the language of section 23 of the Act of March 3, 1871, is clear and unequivocal, consequently there is nothing left for the court to do but to give effect to the plain language of said section.

There is no question but that the language of section 23, segregated from the act, of which it is a part, and construed alone, supports

the contention of the appellees. If this court adopts the construction insisted upon by the appellees, then, there is nothing left in this case.

We contend that the interpretation of counsel for appellees is not correct, and that it violates all the rules of construction. It is admitted, that before rules of construction and interpretation can be resorted to, the law must be ambiguous and inconsistent, its meaning uncertain, or that a literal construction would lead to absurd or ridiculous results.

Appellees insist upon segregating section 23 from the Act of 1871, and construing it without reference to and independently of any other part of said act. Appellant insists this cannot be done, for the following reasons:

I.

The whole act must be construed together, and every part and section thereof given force and effect.

II.

Section 23 of said act is not a complete law in itself. It has no enacting clause, and must rely upon the enacting clause of the act of which it is only a part in order to give it vitality, force and effect.

It was impossible for this grant to the Southern Pacific Railroad Company to have been taken under the Act of July 27, 1866, for the reason that the time in which the company was to commence the construction of said road and the amount of construction that was to be made and completed each year was not extended by the Act of March 3, 1871, nor was the time in which the railroad company was to accept in writing, under its seal, the grant of 1866 extended. These two propositions are established by sections 8 and 12 of the Act of 1866, which are as follows:

Section 8:

> "That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, etc."

Section 12:

> "And be it further enacted: That the acceptance of the terms, conditions and impositions of this act by the said Atlantic & Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act and not afterwards, and shall be deposited in the office of the secretary of the interior."

In all of the Congressional acts reviving grants that had lapsed, Congress always deemed it necessary, as well as reviving the grant, to also extend the time within which the conditions precedent and subsequent should be performed. Section 23 makes no provision for extending the time within which the Southern Pacific Railroad Company could comply with the conditions in regard to accepting the grant and commencing the work or the amount of work that it was required to do each year, consequently it was absolutely impossible for it to have taken said grant under the rights, grants and privileges of the Act of July 27, 1866. As a matter of fact they accepted said grant and commenced the construction of the road under the terms and conditions of the Act of March 3, 1871, by simply filing their map of general location of the line.

By accepting any part of the Act of March 3, 1871, the company, then, by all rules of construction, took the grant subject to all of the terms and conditions, rights and privileges of the Act of 1871, and also under all of the terms and conditions of the Act of 1866, which were not inconsistent with the privileges of the Act of March 3, 1871. It seems to us, that this construction and conclusion is irresistible.

The appellees adopt and appropriate those parts of the Act of 1871, which are necessary

for them to have in order to secure any rights under said act, and reject all those sections of said act that they do not want to be bound by.

It seems to us, that the above and foregoing facts, which we have called to the attention of the court, throws around said section 23, of said act, serious questions as to what really was the intention of Congress, and makes said intention, regardless of the language of said act, ambiguous and uncertain, and to adopt the construction insisted upon by counsel for the appellees, and which was placed upon said section by the opinion of the Circuit Court of Appeals, justifies, and makes it necessary for the court to resort to the usual rules of construction that are appealed to whenever doubts arise over the construction of an act of Congress, where a literal construction leads to inconsistent and absurd results, and when it means the segregation of a part of an act, and the rejection of other parts of the act, which are not in harmony with the construction placed upon this particular section or part of said act.

We will, therefore, briefly present those rules and aids, which the courts have resorted to, in order to throw light upon, and assist them in determining, what was the real intention of Congress in passing said act, in order that that intention may be carried out and given effect.

In the particular act under consideration here, in considering the relation that Congress sustains to the public lands, the courts always bear in mind that these lands are held in trust for all the people, and, in providing for their disposal Congress has sought to advance the interests of the whole country, by opening them to entry in comparatively small tracts, under restrictions designed to accomplish their settlement, development and utilization.

These propositions are well presented in the case of Powhatan E. Causey v. U. S., 240 U. S. 399, 60 L. Ed. 713:

> "The further objection is made that the bill cannot be maintained because it does not contain an offer to return the scrip received when the commuted entry was made. The objection assumes that the suit is upon the same plane as if brought by an individual vendor to annul a sale of land fraudulently induced. But, as this court has said, the government, in disposing of its public lands, does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development, and utilization. And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title, but also to enforce a

> public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded." (Numerous authorities cited.)

In order to arrive at what Congress had in mind and what it intended to do by the Act of March 3, 1871, it is necessary to consider, in a brief way, certain historical facts and legal propositions, in order to arrive at a correct construction of section 23 of this act.

This idea must be borne in mind at all times also that the Act of March 3, 1871, was the last act ever passed by Congress making a grant of public lands to railroads.

Counsel for the defendants in the case of Burke v. The Southern Pacific Railroad Company of California, submitted to Judge Bledsoe, the trial judge in this case, on the 15th of February, 1915, in his brief filed in that case, uses this significant language:

> "This section (section 23 of the act involved in this controversy) was not contained in the bill as originally introduced and was not added until just before the

> final passage of the act. At the time the bill was introduced all the great railroad grants had been made and Congress was not disposed to make any further grants. In fact, the Texas Pacific grant is the very last railroad grant that was ever made. It would have failed but for the general feeling that the Southern states should have an opening to the Pacific."

He undoubtedly expresses the prevailing sentiment of the country in regard to these land grants to railroads as it existed at that date.

(1) HISTORY OF THE LAND LAWS.

The court should always consider and bear in mind two important policies of Congress developed by the experience of the country from its beginning up to the date of the passage of this act.

(a) The policy of Congress in regard to the public domain and the history of the development of this policy.

(b) The policy of Congress in regard to making grants of public lands for internal improvements, including aid to railroads.

The history and development of these two policies have been so fully and carefully presented to this court in the case of the Oregon and California Railroad Company *et al* v. the United States of America *et al.*, 238 U. S. 414 (59 L. Ed. 1388), that it does not seem to us

that it is necessary to any more than briefly call the court's attention to the history and evolution of these policies.

The court, in the opinion in this case, said:

> "The argument to support the contention is based first on the general considerations that experience had demonstrated to the country the evils of unrestricted grants, and that the bounty of Congress had been perverted into a means of enriching 'a few financial adventurers,' and that lands granted for national purposes 'were disposed of in large blocks to speculators as well as to development companies organized by officers of the railroad companies.' Informed by such experience, in substance is the contention, and solicited by petition and moved by the reasoning of some of its members, Congress changed its policy of unqualified bounty, and while not refusing to contribute to the aid of great enterprises, sought to prevent the perversion of such aid to selfish and personal ends, and to promote the development of the country by the disposition to actual settlers of the lands granted."

At the establishment of this government the public lands were considered a public asset to be disposed of and the proceeds derived from the disposition of the same to be used in paying the government's debts and defraying its running expenses.

However, from the very beginning there was a strong minority sentiment in favor of utilizing the public lands for actual settlers, limiting the

amount of land and the terms upon which these actual settlers could acquire the same. The sentiment in favor of retaining the public lands as a national asset was so strong, however, that in 1807 a law was passed by Congress making it a misdemeanor for anyone to settle upon any of the public lands except they had been purchased by public sale or were disposed of by them after having been exposed to public sale as was the original policy of Congress in disposing of the public domain. This law, however, remained practically a dead letter.

The struggle between the parties who favored the policy of retaining the lands as a national asset and those who favored the distribution of them among actual settlers was waged incessantly for forty years. During that time, not less than thirty acts of Congress were passed to relieve settlers who had located upon the public lands in violation of the penal statute making it a misdemeanor to so do.

Pre-emption Law.

In 1841 the first general law was passed by Congress giving citizen settlers, who desired and were willing to occupy the lands for homes, the preferred right. This is what is popularly known as the "pre-emption law." This law immediately became very popular.

At first it only included certain portions of the surveyed public lands, but very soon amendatory laws were passed by Congress which made it applicable to all public lands in all parts of the country, surveyed or unsurveyed.

Homestead Law.

Soon after the passage of the pre-emption law the agitation for a homestead law became very pronounced in the country, and between 1850 and 1860 the political parties incorporated planks in their platforms pledging themselves to give to the people a general homestead law. This homestead law was passed and became a law in 1862. It also was a popular measure with the people.

These laws have continued up to this day as a part of the general land law policy of the country, and have never been changed in any way except to expand and make more liberal their terms.

This briefly is the history of the public land laws as enacted by Congress, which could be elaborated upon very much. It shows how long and how hard a proposition it was to crystallize a sentiment to establish the rights of a free people who had established a government, to protect the best interests of its individual citizenship, and to enable it to distribute its resources fairly and equitably to its people.

Development of the Policies of Congress in Regard to the Public Domain and Donations of Public Lands to Railroads.

The history of the grants of public lands in aid of railroads was enacted in three distinct periods.

The first period commenced with the Illinois Central grant to the state of Illinois on September 20, 1850, and ended with the grant to the territory of Minnesota on March 3, 1857.

All of these grants were made to the states or territories, to be used by them in encouraging internal improvements.

For more than five years, from March 3, 1857, until July 1st, 1862, there were no other grants in aid of internal improvements.

The second period commenced with the Pacific Railroads Bill on July 1st, 1862, and ended with the Stockton & Copperopolis grant of March 2, 1867.

Nearly all of these grants were made to federal corporations. For the next two years, from March 2, 1867, to March 3, 1869, there were no grants in aid of raliroads or any other internal improvements.

The third period commenced on March 3, 1869, and ended on March 3, 1871. During this period only two railroad grants were made, the act of May 4, 1870, to the Oregon Central Railway Company, the same being the act in-

volved, in the Oregon case, *supra*, and the Texas Pacific grant, of March 3, 1871, which is the act involved in this cause.

EVILS OF UNRESTRICTED GRANTS.

The condition of the country from 1850 until the close of the Civil War, covering the first two periods of railroad grants, was such that the evils growing out of these unrestricted railroad grants had not been fully anticipated by Congress. The wonderful development and expansion of the country in commercial and business ways, immediately following the Civil War, were such that the evils resulting from these different unrestricted grants to these railroads showed up in a most prominent manner, especially in the Pacific railroad grants, and the sentiment of the country changed very rapidly and an opposition to these public grants to railroads became so strong that from March 3, 1869, up to the passage of this act in 1871, there was not a grant made or a grant revived or the time for fulfilling the conditions of a grant extended by Congress that did not have attached to it a settler's clause restricting the railroad companies' right to sell the lands granted.

Subsequent to 1867, in the discussion of these questions in Congress, the sentiment was unanimous, as appears by the records of Congress, in favor of placing on these grants restrictions that

they should be sold by the railroad companies to settlers only, in limited amounts and at a maximum price fixed by the acts.

These questions were exhaustively discussed in the brief of the government filed in the Oregon case, *supra*. They were also discussed and referred to in a well considered opinion by Judge Wolverton in the Oregon case, found in 186 Fed. at page 861.

This court, in the case of Oregon & California Railroad v. The United States (59 L. Ed. 917), recognized judicially the change of sentiment of the country in regard to the public land and railroad grant policies. In the opinion it uses this language:

> "In the first grants to railroads there were no restrictions upon the disposition of the lands. They were given as aids to enterprises of great magnitude and uncertain success, and which might not have succeeded under a restrictive or qualified aid. However, the change of times and conditions brought a change in policy, and while there was a definite and distinct purpose to aid the building of other railroads, there was also the purpose to restrict the sale of the granted lands to actual settlers. These purposes should be kept in mind and in their proper relation and subordination."

This quotation establishes the fact that this highest court has recognized the change of policy that the legislation of the country has undergone in regard to these two important matters.

(2) History of the Bill of March 3, 1871.

The Act of March 3, 1871, was introduced in the Senate on the 9th of March, 1870. (2nd Sess. 41st Con. C. Globe 1776.) On June 20, 1870, a substitute for the original bill was adopted, and on June 27, 1870, the bill passed the Senate with a proviso in it in regard to settlers which was substantially the same as the proviso in the bill as it finally passed. (41st Con., C. Globe 4638.)

The original purpose of the Act of March 3, 1871, was to build a trunk line across the southern portion of our country as an act of justice to the South, there having been aid given to three trunk lines across the northern and central portion of the country. Doubtless this grant would not have been considered at all if it hadn't been for this act of justice that the northern representatives in Congress felt was due to the South.

When this bill was messaged to the lower house there was a strong opposition to it on the ground that the policy had been adopted by Congress that no more grants of public lands should be made to railroads. Other members took the position that they would, as an act of justice, favor the grant to the Texas Pacific for its trunk line across the country, but they would absolutely oppose any act giving any aid to any branch lines.

The lower house passed a substitute for the Senate bill near the close of the 41st Congress, in which they eliminated from the bill all of the branch roads. The bill was later referred to a conference committee, which attached to it section 23 of this act, and, on the last day and in the last hours of the 41st Congress, the conference report was adopted without argument or discussion.

The history of this matter and the discussions that grew out of it will be found in the records of the 41st Congress, 3rd Sess., Con. Globe 1468, 1470, 1911, 1946, 1954, 1955; 3rd Sess. Appen. 193.

The growing sentiment against these railroad grants was also shown in memorials that were passed by the legislatures of the different states, and numerous petitions of the people, protesting against any further grants to railroads and urging Congress to take steps to forfeit the grants that had already been made, where the terms and conditions of the grant had not been carried out by the railroad company.

Among other memorials was one passed by the legislature of the state of California and presented to Congress by Senator Casserly on January 21, 1870, more than a year prior to the passage of this act in question. Among other things the memorial recited:

"That numerous tracts of land in the state, amounting to about thirteen million acres, are now owned or claimed by a few railroad companies under grants from Congress. That said lands comprise a very considerable portion of the agricultural lands of our state. That the holding of or claiming of said large tracts of lands by a few persons has proven very disastrous to the interests of citizens by preventing the development of our resources and the settlement of our state. And it is further represented that more than one-half of the said thirteen million acres claimed by the Southern Pacific Railroad Company by the provisions of the act of Congress passed July 27, 1866, that the lands claimed by them virtually covers every alternate section now belonging to the United States to the width of sixty miles, from the bay of San Francisco for a distance of about six hundred miles to the southern line of the state." (2nd Sess., 41st Con., C. Globe 630.)

This referred to the original grant to the Southern Pacific Railroad Company and was passed by the legislature of the state of California more than a year prior to the act involved in this controversy.

This shows pretty conclusively the prevailing sentiment of the state of California in regard to making any other grants to railroads of public lands lying in this state, and especially to this defendant.

As to the prevailing sentiment of the country at that time, see the proceedings in Congress

during the 40th Congress, 2nd Sess., C. Globe 371, 637; 3rd Sess., Con. Globe 463; 3rd Sess. Appen. 70.

In the construction of laws and acts of Congress it is necessary to recur to the history and situation of the country to ascertain the reason as well as the meaning of their provisions.

In Preston v. Browder, 1st Wheaton 121, 4 L. Ed. 51, the court in the opinion said:

> "In the construction of the statutory or legal laws of a state, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable the court to apply with propriety the different rules for construing statutes."

In the case of the United States v. The Union Pacific Railroad Company, 91 U. S. 72, 23 L. Ed. 228, the court in the opinion said:

> "The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts may, with propriety, in construing a statute, recur to the history of the times when it was passed, and it is frequently necessary, in order to ascertain the reasons as well as the meaning of particular provisions."

(3) The Doctrine of In Pari Materia.

Another rule of construction which has been resorted to by the courts to enable them to determine the intent of the legislative body and

what it had in mind when an act was passed, in order that that intent might be given effect, by placing that construction upon the legislative act, is the doctrine of *in pari materia,* that is, considering and construing together the laws that were passed during that period and contemporaneously with the time when the act to be construed was passed, legislating upon the same subject-matter involved in the act to be construed. In fact, the authorities seem to make it imperative upon the courts to reconcile and construe them together, acts passed governing the same subjects.

The appellant insists that the Court of Appeals placed an entirely too narrow and limited application of the law of *in pari materia.* In the authorities which we have already cited, and those we shall hereinafter call the court's attention to, we believe, establishes the proposition that the courts, as a rule of construction, have, and may resort to other acts which have been passed by Congress, giving aid to railroads in the way of public land grants.

Bearing in mind that Congress, in the disposition of the public lands, always has in view a general and well defined policy, which directs and controls its action in all grants of the public domain, and that this general policy will be carried out in all of these laws, unless there is some well defined and understood reason

why an exception should be made in any particular grant.

We believe that these different acts, making these grants to different railroads, come within the law of *in pari materia.*

In Vol. 26 A. & E. Encyc. of Law, 620, the author announces the following proposition on this question:

> "In arriving at the intent of the legislature in enacting a statute, not only must the whole statute, and every part of it, be considered, but where there are several statutes *in pari materia,* they are all, whether referred to or not, to be taken together, and one part compared with another in the construction of any one material provision."

And further, on page 623, he announces:

> "Especially does this rule apply to statutes passed at the same session of the legislature. If such statutes are *in pari materia,* they must be construed together, and if possible, all must be allowed to stand and effect must be given to each of them, regard being had to the intention of the legislature. So contemporaneous legislation, not precisely *in pari materia* with the statute to be construed, may be referred to on the question of intent."

How is it possible for the defendants to avoid the effect of this legal proposition? The grant to the Texas Pacific and the construction of the Texas Pacific was the primary object that Con-

gress had in view by the Act of March 3, 1871. The grant to the defendant, the Southern Pacific Railroad Company of California, was a part of this same act, and it could not be construed to be more than a secondary object that Congress had in view. If statutes that are passed at the same session of the legislature on the same general subject are *in pari materia* and must be construed together, how is it possible that different parts of the same act can be segregated and thus relieved from the conditions and limitations that follow if it was construed with the whole of the act of which it is a part? This fact alone would place a doubt upon the construction of section 23 of said act as to whether or not it referred, for its conditions and limitations and for the grant, to the Act of July 27, 1866. When construed under the rules of construction that must be invoked, and the authorities supporting the same, which we will hereinafter call the court's attention to, it seems to us, it becomes impossible to construe this grant to the Southern Pacific as being effected by any other granting clause except that given under section 9 of the Act of March 3, 1871, and subject to the proviso attached to said section.

In support of this proposition also see:

Hamilton v. Rathbone, 175 U. S. 414, 44 L. Ed. 219;

United States v. Freeman, 3 Howard, 11 L. Ed. 562;

United States v. Fischer *et al.*, 2 Cranch 400, 2 L. Ed. 318;

Saxonville Mills v. Russell, 116 U. S. 13, 29 L. Ed. 554;

Church of the Holy Trinity v. U. S., 143 U. S. 457, 36 L. Ed. 227;

Charles River Bridge v. Warren Bridge *et al.*, 36 U. S. 543, 9 L. Ed. 822;

Kohlsaat v. Murphy, 96 U. S. 153, 24 L. Ed. 846;

Lewis Sutherland's Statutory Construction, 2nd Edition, section 284 and note, sections 443-448, 548, 879.

The court will not be bound by the strict letter of the law. If the purpose and well ascertained object are inconsistent with the precise rules of a part of an act, the latter must yield to the paramount and controlling influence of the will of the legislature resulting from the whole.

This was clearly announced in the case of the church of the Holy Trinity v. United States, *supra*. The court in the opinion said:

> "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church

is one of service, and implies labor on the one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind'; and further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force in this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within the spirit nor within the intention of the makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislature, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding the enactment or of the absurd results which follow from giving such broad meaning to the words, making it unreasonable to believe that the legislator intended to include the particular act."

In the case of Viterbo v. Friedlander, 120 U. S. 707, 30 L. Ed. 776, the court quoted with approval from Chief Justice Eustis as follows:

"A statute must be construed with reference to its object, to the legislation and system of which it forms a part, in order to ascertain its true meaning and intent; and if its purpose and well ascertained object are inconsistent with the precise words of a part, the latter must yield to the paramount and controlling influence of the will of the legislature resulting from the whole. Commercial Bank v. Foster, 5 La. Ann. 516. And in Childers v. Johnson, 6 La. Ann. 634, the court said: 'It is a sound rule of interpretation, in construing an article of the code with reference to a subject-matter, to take into view the general system of legislation upon the subject-matter contained in the same work; and where a provision of the code is invoked in derogation of the common rule regulating the subject-matter, the intention so to derogate should be clear and beyond reasonable doubt. If an interpretation can be given to the particular article which, without doing violence to its terms, will make it harmonize with the general rules and the other provisions of the code regulating the subject-matter, such interpretation should be adopted.'"

In the case of Oates v. First National Bank, 100 U. S. 239, 25 L. Ed. 582, the court in the opinion said:

"The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction, and we should discard any

construction that would lead to absurd consequences."

The following authorities also support these propositions:

United States v. Fisher *et al., supra;*
Wisconsin v. Forsythe, 159 U. S. 55, 40 L. Ed. 74.

The acts of Congress in regard to the disposition of the public lands and also the acts of Congress in regard to the donation of public lands to railroads constitute a system of laws, are all *in pari materia,* and to be looked to as one statute in explaining their meaning and import. The same being modified by Congress from time to time, as experience and observation show that they were defective or failed to meet the ends and purposes Congress had in view.

In the case of Wisconsin Central R. R. Co. v. United States, 164 U. S. 205, 41 L. Ed. 404, the court in the opinion said:

> "An intention to surrender the right to demand the carriage of the mails over the subsidized roads at reasonable charges would be opposed to the policy established by well nigh uniform Congressional legislation on the subject, and although there may have been departures from that policy in a few instances under exceptional circumstances, none of them justify the contention that such departure was intended here."

In Doe, ex Dem, Patterson v. Winn *et al.*, 24 U. S. 385, 6 L. Ed. 501, the court in the opinion said:

> "The land law of Georgia is comprised under several statutes, passed at different periods, varying and modifying the system occasionally, as policy required. But all being *in pari materia,* are to be looked to as one statute, in explaining their meaning and import."

In the case of Ryan v. Carter, 93 U. S. 78, 23 L. Ed. 809, the court in the opinion said:

> "If there were any doubt remaining, about the correctness of this construction, it would be removed by a consideration of the Act of 1807, which is *in pari materia.* Congress passed various laws, from time to time, respecting the claims to lands in the territories of Orleans and Louisiana. These laws were modified as policy required; but they constitute one land system, are all *in pari materia,* and to be looked to as one statute in explaining their meaning and import."

In the case of Kohlsatt v. Murphy, *supra,* the court in the opinion said:

> "In the exposition of statutes, the established rule is that the intention of the lawmaker is to be deduced from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject, they are all to be taken together, and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or

inconsistent provisions, they are supposed to have the same object and as pertaining to the same system. Resort may be had to every part of a statute, or, where there is more than one *in pari materia*, to the whole system, for the purpose of collecting the legislative intention.

"Rules and maxims of interpretation are ordained as aids in discovering the true intent and meaning of any particular enactment; but the controlling rule of decision in applying the statute in any particular case is, that whenever the intention of the legislature can be discovered from the words employed, in view of the subject-matter and the surrounding circumstances, it ought to prevail, unless it lead to absurd and irrational conclusions, which should never be imputed to the legislature, except when the language employed will admit of no other signification."

The proposition that laws *in pari materia* must be construed as if they formed parts of the same statute and were enacted at the same time is supported by the following authorities:

Plummer v. Murray, 51 Barbour (N. Y.) 202;

United Society v. The Eagle Bank, 7 Conn. 469;

Town of Highgate v. State, 7 Atlantic Rep. 898;

Sales v. Barber Asphalt Pav. Co., 66 S. W. Rep. (Mo.) 979;

State v. Gearhardt, 33 L. R. A. (Ind.) 313;

Reiche v. Smythe, 80 U. S. 162, 20 L. Ed. 566;

In re Moore, 66 Fed. 950.

Words cannot be segregated from the entire context and construed as unambiguous. As to the elements that enter into the question of determining whether or not there is ambiguity, the case of O'Brien v. Miller, 168 U. S. 297, 42 L. Ed. 472, is instructive. The court in the opinion said:

> "There can be no doubt that, considered in themselves and alone, there is no ambiguity in the words found in the clause of the contract providing that 'if during said voyage, an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall inevitably happen, * * * this obligation shall be void. But the question presented involved not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract. The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself. In other words, the confusion of thought consists in failing to dis-

tinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then in every case it would be impossible to arrive at the meaning of a contract, in the event of a difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them."

Another case that is instructive upon the proposition that the courts will not follow the strict letter of the statute is found in the case of Dubuque & Pacific Railroad Company v. Litchfield, 64 U. S. 66, 16 L. Ed. 509, construing an act of Congress making a donation of land to the territory of Iowa. The uncertainty in the grant which afterwards arose, grew out of this language, "In a strip five miles in width on each side of said river." The donation was made to assist the territory of Iowa in improving the navigability of the Des Moines River from its mouth to the mouth of the Racoon Fork where it emptied into the Des Moines River, it being contended on the one side that that included a strip of land on each side of said river from its mouth to the north line of Iowa. The other

contention was that it included only a strip from its mouth to the mouth of the Racoon Fork, which was comparatively a short distance along said river through the territory of Iowa. There probably never was an act of Congress upon which as many cases reached the Supreme Court, challenging the construction of the language, as resulted from this one. Even the land departments of the federal government first would take one view of it and then the other, finally deciding that Congress could not have intended to grant any land except from the mouth of the river to the Racoon Fork.

In support of this proposition also the following cases are cited:

Church of Holy Trinity v. United States, *supra;*

Green County v. Quinlan, 211 U. S. 594, 53 L. Ed. 341;

U. S. v. Central Pac. R. R. Co., 118 U. S. 235, 30 L. Ed. 174.

(4) The Reasonable Construction of the Language and Context.

The language and reasonable and natural construction of section 23 of this act, together with the context, it seems to us, makes it impossible for the court to adopt the construction placed upon it by the Court of Appeals for the following reasons:

(a) There is no granting clause in section 23 by which was made any grant of public lands to the defendant, the Southern Pacific Railroad Company. Unless the granting clause of section 9 of said act is referred to by this section and adopted as making the grant to the Southern Pacific Railroad Company, there is no grant contained in section 23. It is not claimed that any grant to the Southern Pacific Railroad Company, for the purposes set out in section 23 of this act was contemplated or made by the Act of July 27, 1866. If the Southern Pacific Railroad Company got any grant under the Act of March 3, 1871, and section 23 of that act, it was under and by virtue of that act alone that it acquired said grant. The only manner in which section 23 can be construed as referring back to and effecting the grant to the Southern Pacific at the date of the passage of this Act of March 3, 1871, would be by implication. A grant or conveyance will never be inferred and upheld by implication. We contend that of necessity the court should and must hold that the Southern Pacific Railroad Company obtained this grant for the lands involved in this controversy under and by virtue of the Act of March 3, 1871, and the granting clause of said act contained in section 9 thereof, and was therefore bound by all of the terms and conditions of said act.

It was impossible for this grant, to the Southern Pacific Railroad Company, to have been taken under the Act of July 3, 1866, for the reason, as hereinbefore pointed out.

It was necessary, under section 8 of said act, that the company should commence work on said road within two years from the approval of this act by the President; and, under section 12 of said act, the company was required to signify in writing, under the corporate seal of said company, its acceptance of said act and grant, within two years after the passage of said act, and not afterwards.

The time within which the company was to perform these acts was not extended by section 23 of the Act of March 3, 1871, consequently, it was a physical impossibility for the company to have taken the grant of public land under the Act of 1866.

(c) If the language in section 23 of the Act of March 3, 1871, is subject to the construction which the Court of Appeals placed upon the clause, "With the same rights, grants and privileges," without doing any violence to the language or rules of construction, it could also be construed as referring to the granting portion of the Act of March 3, 1871, as contained in section 9 of said act. In other words, to give the language the benefit of a reasonable and the

most liberal construction, and waiving all other arguments against construing it as referring to the granting clause of the Act of '66 and admitting that it might, with equal propriety, refer to either the granting clause of the Act of 1866 or the granting clause of 1871, which contains the settlers' clause, then the law which we have already cited and which the Supreme Court just recently, in the case of Oregon & C. R. R. Co. v. United States, *supra*, states is rudimentary, would be applicable, and that construction would be adopted which is most favorable to the public and against the defendants.

(d) Adopting the construction contended for by counsel for the defendants leads to absurd and irrational results and impugns the motives of Congress. It would certainly lead to ridiculous and absurd results in attempting to construe this section, to say that Congress meant and intended to load the primary purpose and object it had in mind in making this grant to the Texas Pacific, with this condition, and then give a large grant without any limitations, restrictions or conditions to a branch road, a purely local proposition, to aid it.

(5) THE ACTS OF CONGRESS MAKING GRANTS TO RAILROADS SHOW SETTLERS' CLAUSE ATTACHED TO EVERY GRANT AFTER MARCH 3, 1869, AND THE COURT WILL AVOID THAT INTERPRETATION THAT WILL LEAD TO ABSURD AND RIDICULOUS RESULTS.

The history of Congress shows that from March 3, 1869, up to the passage of this Act of March 3, 1871, there wasn't a grant made or an old grant revived or extended that did not have attached to it a settlers' clause. This had become the settled policy of Congress. It was incorporated in all of the land grant bills after that day as a matter of course and without any discussion or objection. The sentiment of the country had become so strongly opposed to land grants to railroads that, as counsel for defendants well said, in his brief filed with Judge Bledsoe in the case of Burke v. The Southern Pacific Railroad Company of California, *supra*, it would have failed but for the general feeling that the Southern states should have an opening to the Pacific, and this was the very last railroad grant ever made. Would it not be absurd and ridiculous to place upon this act a construction, under these circumstances, that placed Congress in the position of reversing the unquestioned established policy by adding the settlers' clause to all of these land grants and also adding it to

the main purpose which induced the Act of 1871, and giving without any restrictions, limitations or conditions, a large grant to these defendants. Congress never intended such an absurd and ridiculous result.

The Supreme Court in many different cases has held that the courts will avoid making a literal interpretation of a law where such results will follow. We will content ourselves by quoting from one authority and simply citing others that announce the same doctrine.

In the case of Heydenfeldt v. Daney Gold & Silver Mining Company (93 U. S. 638, 23 L. Ed. 995) the court in the opinion said:

> "If a literal interpretation of any part of it would operate unjustly or lead to absurd results and be contrary to the evident intent of the act taken as a whole, it will be rejected; and there is no better way of discovering the true meaning of a law when there are expressions in it which are rendered ambiguous by their connection with other clauses than by considering the necessity for it, and the causes which induced the legislature to pass it. This interpretation, although seemingly contrary to the letter of the statute, is within its reason and spirit."

Kohlsaat v. Murphy, *supra;*

Church of the Holy Trinity v. United States, *supra;*

United States v. Fisher, *supra;*

United States v. Bashan, 50 Fed. 754;

Scott v. Latimer, 89 Fed. 846;
Davis v. Bohle, 92 Fed. 328;
Liverpool & London Globe Ins. v. Kearney, 94 Fed. 316.

For the reasons already given this question cannot be dismissed by simply saying that the language used in this section is so plain and unequivocal that it does not impose upon the court the necessity of placing any construction upon it other than what the plain language imports.

There is no question of forfeiture or cancellation of the grant involved in this case. It is admitted that the defendants have earned the grant and that their title to the grant is perfect, subject to the limitations of the proviso which we contend applies to this grant. The crucial question is, "Did they take the grant subject to the proviso and the limitations of section 9 of the Act of March 3, 1871":

> "That all such lands, which shall not be sold, or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

We insist upon upholding the grant, but urge that it was accepted by the defendants with the

above restrictions and limitations and that they were bound by these, and that it is an enforceable covenant.

RECAPITULATION OF THE POINTS URGED TO ESTABLISH THE FACT THAT THESE DEFENDANTS ACCEPTED AND RECEIVED THIS GRANT, BURDENED BY THESE LIMITATIONS AND CONDITIONS, AND ARE BOUND BY THEM.

1. That the history of the legislation of Congress in regard to the public land policy and its policy in regard to land grants for internal improvements, and especially railroad grants, had been modified to the extent that all the later grants had incorporated in them the provision that all lands so granted should be sold to settlers only, in limited quantities and at limited prices, instead of an unlimited right to dispose of them as was given in the former grants.

2. The history of this act and the record of Congress made in regard to it from the time it was introduced until its final passage refutes every idea that the defendant, the Southern Pacific Railroad Company of California, was to receive this grant on any other or more favorable terms than was given to the Texas Pacific Railroad Company.

3. The doctrine of *pari materia*, that is, construing this act with all other grant acts covering that period, as defining the policy of Congress on this subject, following the rule laid down in Ryan v. Carter, *supra*, in which the court said:

> "If there were any doubt remaining, about the correctness of this construction, it would be removed by a consideration of the Act of 1807, which is *in pari materia*. Congress passed various laws, from time to time, respecting the claims to lands in the territories of Orleans and Louisiana. These laws were modified as policy required, but they constitute one land system, are all *in pari materia*, and to be looked to as one statute in explaining their meaning and import."

4. The context and the language of section 23 of said act, and giving it its reasonable and natural construction, warrants and demands the construction we contend for.

5. It was impossible for the defendant, the Southern Pacific Railroad Company, to have taken this grant under the Act of 1866, for the reason that the time in which it was required to perform many of the conditions in that act were not extended by Congress, and for that reason it was necessary for it to accept the grant under some of the conditions of the Act of 1871, and if for no other reason, by doing this, it became bound by all of the terms of the Act of 1871.

Concluding Argument.

I.

The decision of this court upon the first proposition will settle this case, so far as this court is concerned. If the opinion of the Court of Appeals is affirmed, as to the construction of these statutes, there is no other question left in the case.

If the opinion of the Court of Appeals is not approved, then this court will indicate what construction should be placed upon said statutes, and reverse the case and remand it to the trial court, directing it, to proceed with the trial of the case according to the opinion entered by this court.

There certainly can be no question in the mind of this court, that it ever was the intention of Congress to grant to the defendant, the Southern Pacific Company, and its allied companies, the defendants herein, this great block of public lands upon any other terms, or conditions than those made in section 9 of said act, and which were imposed upon the main grant, which was the purpose and object of the act.

In their brief, filed in the Court of Appeals, counsel for the defendants used this language:

"It is to be regretted that this court's time must be taken up with cases of this character. The fact, however, that such cases may have no substantial foundation does not make them any

the less annoying or injurious to the rights of others."

It is remarkable, that anyone who challenges any of the rights, or assumed rights, of these defendants, and this has always been true with them, is, in their mind, little better than a hold-up,—blackmailer and criminal. Up until the past few years, anyone who should have exhibited the temerity to have assailed their rights in this matter, in the state of California, at least, would have been fortunate, indeed, if he had not landed in prison, upon some trumped up charge, instigated by some one of these defendants. It is common knowledge, that many citizens resisting and contesting the encroachments of the Southern Pacific Company, and its allied companies, upon private rights, suffered all kinds of persecution at their hands. The activities of these companies in politics, and the domestic affairs of the Pacific Coast states, and especially the state of California, was a public scandal; and, their activities extended to the National Capitol, where it became a national scandal that almost shook the foundation of our government.

They attempted to dominate legislation that affected their interests, and to name public officials that might be useful to them. They have probably consumed more time of the courts, in trying to uphold unreasonable and outrageous

grants, and privileges they have wrongfully succeeded in getting from the public, than any other one litigant. Now, they are extremely solicitious, that the courts may not be imposed upon when citizens challenge, through the court, their rights in and to some of these questionable acquisitions. Their nerve is certainly monumental. However, that influence, and time for accomplishing their methods, through such tactics, has passed.

As it was well stated in one of the leading conservative daily journals of the country, published on the Atlantic Coast, in an editorial last June, commenting on the oil suits instituted against the Southern Pacific Company, and others, by the United States, involving oil lands in the state of California, said article, among other things, said:

> "There was so much fraudulent acquisition of federal lands in some of the far western states, during the last decades of the last century, that the government hesitated long about entering on the fight for restoration. Courts that, in some cases, had been party to the deception, naturally could hardly be relied upon to help either the honest settler or the government to get his or its just deserts, if resort were had to litigation. Nevertheless, honest prosecutors were found and courts that loved righteousness, and in due time the lands began to go back to public ownership, and then out to *bona fide* buyers and settlers."

Does not this article state tersely the real situation and condition that actually existed?

II.

It is possible that the open boast, made by the representatives and agents of these defendants, are true, and that the Southern Pacific Company, and its allies, did "put one over on Congress," when they got this section 23 attached, as a rider, to the Act of 1871, and, that they have gotten away with a great grant that Congress never intended that they should have.

We do not believe that these defendants are entitled to the construction of these statutes that they contend for, and that the trial court, and the Court of Appeals, have given them. From our view, we do not see how, when the ordinary rules of construction are applied, and all of the facts and circumstances are considered, that it is possible to sustain the construction given by the United States Circuit Court of Appeals.

We believe that the reasons we have given, asking for the construction that we contend for of these acts, are well founded and that they have the support of this court. We believe that the contention of the defendants in support of this motion to dismiss is not well taken, and that the motion should have been overruled, and that the court should, in overruling said motion, have determined that the defendants are bound by all of the provisions and conditions of the Act of March 3, 1871, and that all the lands granted in said act to the defendants,

which had not been sold or otherwise disposed of within three years after the completion of their entire road, was subject to the limitations of section 9 of said act.

It is, therefore, respectfully submitted that the decree of the United States Circuit Court of Appeals should be reversed.

J. MACK LOVE,
FRED BEALL,
Solicitors and Attorneys for Appellant.

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Supreme Court of the United States

October Term, 1918.

GEORGE S. FULLINWIDER,
Plaintiff and Appellant,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY, et al.,
Defendants and Appellees.

No. 121

Appeal from the United States Circuit Court of Appeals, for the Ninth Circuit.

BRIEF FOR APPELLEES.

CHARLES R. LEWERS,
65 Market St., San Francisco, Cal.
Attorney for Appellees.

WM. F. HERRIN,
Of Counsel.

Supreme Court of the United States

October Term, 1918.

GEORGE S. FULLINWIDER, *Plaintiff and Appellant,* vs. SOUTHERN PACIFIC RAILROAD COMPANY, et al., *Defendants and Appellees.*	No. 121

Appeal from the United States Circuit Court of Appeals, for the Ninth Circuit.

BRIEF FOR APPELLEES.

Statement.

This is a suit in equity brought by the appellant in the United States District Court for the Southern District of California to compel the Southern Pacific Railroad Company to convey to him a half section of land situated within the limits of the grant made to this railroad company by the 23rd section of the Act of Congress of March 3, 1871 (16 *Stat. L.* 573). This act made two distinct grants of land, one to the Texas & Pacific Railroad Company and the other to the Southern Pacific

Railroad Company. The tract in question in the present suit is not within the limits of the grant made to the Texas & Pacific Railroad Company but lies entirely in that made to the Southern Pacific Railroad Company.

The appellant alleged in his complaint that he tendered $2.50 an acre to the railroad company and demanded a conveyance of this land (which was refused), under the provisions of that portion of Section 9 of the Act of March 3, 1871 (applicable by its terms only to the separate grant made to the Texas & Pacific Railroad Company), which reads as follows:

> "And provided further, That all such lands, so granted by this section to said company, which shall not be sold, or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted." (16 *Stat. L.* 576.)

The appellees moved to dismiss the suit on the ground that the bill of complaint did not state facts sufficient to constitute a cause of action in equity. This motion was granted by the District Court without leave to amend and a decree was entered finally dismissing the bill. On appeal to the Circuit Court of Ap-

peals for the Ninth Circuit this decree was affirmed (229 *Fed.* 712). The present appeal is from this latter decision and decree.

Argument.

The sole question presented on this appeal is whether the so-called "settlers clause" in the ninth section of the Act of March 3, 1871, quoted above, is applicable to the Southern Pacific Railroad Company. Our contention is that it applies only to the separate grant made to the Texas & Pacific Railroad Company and not to the grant to the Southern Pacific Railroad Company.

The grant made by this act to the Southern Pacific Railroad Company is contained in the 23rd section, which reads as follows:

> "That, for the purpose of connecting the Texas Pacific railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to the Southern Pacific Railroad Company of California, by the act of July

> twenty-seven, eighteen hundred and sixty-six; *Provided, however,* That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

The Southern Pacific Railroad Company is not mentioned elsewhere in the act. It is obvious that Congress intended to make the grant to this road just as separate and distinct from that to the Texas & Pacific as if it had been contained in a separate enactment. Instead of delimiting this separate grant by reference to the conditions of the accompanying grant to the Texas & Pacific Railroad Company, which would have been the obvious course had Congress intended to accomplish what the appellant now claims, it was definitely provided that this grant to the Southern Pacific Railroad Company should be subject to the "limitations, restrictions, and conditions" contained in the earlier grant made to the Southern Pacific Railroad Company by the Act of July 27, 1866, which earlier act does not contain the "settlers clause".

In our view the language of Section 23 is so clear that extended argument as to its meaning is unnecessary. The Circuit Court of Appeals

for the Ninth Circuit reached this conclusion, saying:

> "Section 23 is plain, clear and unambiguous, and leaves no room for construction, and there is no room to doubt that Congress thereby granted lands to the appellee with the same rights, grants and privileges, subject to the same limitations, restrictions and conditions, as were the lands granted by it to the same company by the act of July 27, 1866" (229 *Fed.* 717, 718).

The decisions of this Court have already determined that the grant made to the Southern Pacific Railroad Company by Section 23 is controlled and measured only by the provisions of the 1866 act. In *United States* vs. *Southern Pacific Railroad Company,* 146 U. S. 570, 595, 605, it was held that the grant given by this section was subject to the "limitations" of the act of July 27, 1866. This decision practically disposes of the present case since it was stated at page 595 of the opinion that the reference in Section 23 of the Act of March 3, 1871, to the Act of July 27, 1866, "defines the extent of the grant and the character of the rights and privileges" given to the Southern Pacific Railroad Company.

The separate and distinct character of the grant thus made by Section 23 was again rec-

ognized in the case of *Southern Pacific Railroad Company* vs. *United States,* 189 U. S. 447, where it was held that this section made a special grant to the Southern Pacific Railroad Company and that the grants were so distinct that the Texas & Pacific Railroad Company was "another railroad company" whose rights were made superior to those of the Southern Pacific Railroad Company by the concluding proviso of Section 23. The separate character of this grant was also recognized in the later cases of *Southern Pacific Railroad Company* vs. *United States,* 228 U. S. 618, 622, and *Burke* vs. *Southern Pacific Company,* 234 U. S. 664, 680.

A considerable portion of the appellant's brief is devoted to the contention that the "limitations" of the Act of July 27, 1866, could not have been intended to govern the grant contained in Section 23 of the Act of March 3, 1871, because the earlier act required that the construction of the railroad should begin within two years, that is, before July 27, 1868. From this asserted fact it is sought to be inferred that Congress could not have meant to apply the limitations of the Act of 1866, but did in fact mean to apply those contained in the act of 1871.

The obvious answer to this argument is that Congress definitely stated in Section 23 of the Act of 1871 that the limitations of the Act of 1866 should apply to the Southern Pacific Railroad Company. Whether this requirement was workable or not was a matter which concerned only the government and the railroad company. The grant thus given has been carried out by the issuance of numerous patents which the appellant is in no position to question. The proper time for beginning the construction of the railroad authorized by Section 23 does not appear to have been called in question, nor does valid reason exist for such question. Congress could not have intended in 1871 to require the railroad company to begin construction three years before the grant was actually made. But it did intend to fix the general *character* of the grant now in question by reference to the terms of the 1866 grant. This Court has already held that Section 23 "does not operate to make the latter grant take effect by relation as of the date of the prior grant", but "merely defines * * * the character of the rights and privileges" conferred upon the Southern Pacific Railroad Company (*U. S.* vs. *Southern Pacific Railroad Company,* 146 U. S. 570, 595).

Even if the limitations in Section 23 were in fact applicable in the strict sense suggested

by the appellant, they would be no more than conditions subsequent, and would therefore fall within the ruling of this Court that a congressional declaration of forfeiture would be necessary to give them effect (*Schulenberg* vs. *Harriman,* 21 Wallace 44; *Bybee* vs. *Oregon etc. Ry.,* 139 U. S. 663, 675; *United States* vs. *Southern Pacific Railroad Company,* 146 U. S. 570).

And if the "settlers clause" limiting the grant to the Texas & Pacific Railroad Company had been made a part of the separate grant contained in Section 23, the appellant would still have no cause of action, since such a clause creates no right enforceable by any particular individual (*Oregon and California Railway* vs. *United States,* 238 U. S. 393, 434).

Scandalous Matter in Appellant's Brief.

Pages 58 to 60 of appellant's brief in this Court contain a number of statements not based on the record (or upon fact), which severely reflect on the integrity of the appellees and even upon that of the federal courts in California. An unnamed "leading conservative daily journal" is alone given as authority for this attack upon the appellees and upon the courts. In the same connection it is stated, also without the slightest foundation in

the record or in fact, that the appellees have made "open boast" that they had "put one over on Congress" when they obtained the passage of Section 23 of the Act of March 3, 1871.

Whether these statements are made for the purpose of suggesting that the appellees had improperly influenced the District Court and the Circuit Court of Appeals in the present case does not clearly appear. Possibly they were prompted by the desire to answer comments concerning this class of litigation made by the District Court in the similar case of *Burke* vs. *Southern Pacific Railroad Co.*, 222 Fed. 97, 98. But, whatever the appellant's reason for inserting them in his brief may have been, they are of such an improper and scandalous nature that we are constrained to call them to the attention of this Court for such appropriate action as its practice and precedents require.

Respectfully submitted,

November 20, 1918.

CHARLES R. LEWERS,
65 Market St., San Francisco, Cal.
Attorney for Appellees.

WM. F. HERRIN,
Of Counsel.

FULLINWIDER *v.* SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 121. Submitted December 20, 1918.—Decided January 13, 1919.

The Act of March 3, 1871, c. 122, 16 Stat. 573, granted public lands to the Texas Pacific Railroad, conditioned that those not sold or disposed of within three years from the completion of the road should be subject to settlement and preëmption at a maximum price, and other public lands to the Southern Pacific Railroad, "with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the Act of July 27, 1866." *Held*, that the condition of the Texas Pacific grant was inapplicable to the grant made by the same act to the Southern Pacific.
229 Fed. Rep. 717, affirmed.

THE case is stated in the opinion.

Mr. Fred Beall for appellant. *Mr. J. Mack Love* was also on the brief.

Mr. Charles R. Lewers and *Mr. Wm. F. Herrin* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Appeal from a decree of the Circuit Court of Appeals affirming a decree of the District Court in and for the Southern District of California dismissing upon demurrer a bill brought by appellant (we shall refer to him as complainant) against the railroad company to compel the

company to convey to him a certain one-half section of land within the limits of the congressional grant to the company made by the Act of March 3, 1871, c. 122, 16 Stat. 573.

The bill alleged the incorporation of the company and that of various corporations impleaded with it, and the following facts: March 3, 1871, Congress made a grant to the Texas Pacific Railroad Company of certain sections of the public lands and provided that the lands which should not be sold or otherwise disposed of within three years after the completion of the entire road should be subject to settlement and preëmption like other lands at a price to be fixed by and paid to the company at not exceeding an average of $2.50 per acre for all of the lands granted.

Section 23 of the act made a further grant of certain sections of the public lands in the State of California to the Southern Pacific Railroad and contained the provision that the company should construct a line of railroad from and to certain named points, "with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the Act of July 27, 1866." [c. 278, 14 Stat. 292.]

The road was completed between the designated points more than ten years prior to the 1st of December, 1913.

Among the lands which have not been sold or disposed of that are within the limits of the grant are those described in the bill, and on October 29, 1913, complainant (appellant) tendered the company $800 and demanded of it and the other defendants (appellees) a conveyance of the land, which demand was refused, to the injury and damage of complainant. The land is of the value of $3,000 and complainant has the qualifications entitling him to purchase the land.

Complainant offers to pay the $800 in court and alleges

that the suit was brought, among other things, for the purpose of having the court interpret and construe the acts of Congress referred to. The other defendants are alleged to have an interest in the land and a construction of the acts of Congress is prayed and of all other acts that have any relation to them; that defendants be decreed to convey to complainant the land and that he have general relief.

Sections 9 and 23 of the Act of March 3, 1871, are directly involved; the other sections of the act and other acts only as illustrating §§ 9 and 23.

By § 9 a land grant is made to the Texas Pacific Railroad of public land in California in the terms and qualifications which are quite familiar and contains the provision set out in the bill which subjects the land unsold within three years after the completion of the road to settlement and preëmption at a price not exceeding an average of $2.50 an acre.

By § 23 the Southern Pacific Railroad Company of California was authorized to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, "with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted" to the Southern Pacific Railroad Company by the Act of July 27, 1866, with reservations of rights to other railroad companies.

Based on this provision complainant puts three questions as involved in the case, but says it is only necessary for this court to answer the following one: "Was this grant of lands to the Southern Pacific Railroad Company under the Act of March 3, 1871, made subject to the rights, grants and privileges of said act, or under the rights, grants and privileges of the Act of July 27, 1866, and subject only to its terms?" Complainant's answer to the question is that the grant to the Southern Pacific was

made under the Act of 1871 and not under the Act of 1866, and deduces from that that the provision in § 9 requiring under certain circumstances a sale to preëmptors is applicable to the Southern Pacific.

Complainant's argument in support of the answer does not submit easily to succinct statement. Its postulate is that the policy of Congress in regard to the public lands came to have its chief solicitude in the disposition of them to actual settlers at reasonable prices and that this policy was not overlooked even in the grants to railroads. And the policy dictated, it is said, the provision of § 9 of the grants to the Texas Pacific Railroad Company, and determines the insertion of a like provision in § 23 which concerns the grant to the Southern Pacific Company, though it is not inserted therein. We may grant, if a policy exists, that it may be used to resolve the uncertainty of a law, but it cannot be a substitute for a law. However, we do not find the uncertainty in §§ 9 or 23 that complainant does, whether jointly or separately considered. Section 23 is complete in itself. The restrictions upon the grant it made that were deemed appropriate were expressed, and their expression excludes any other by a well known rule of construction.

Let us repeat: the Southern Pacific Company is authorized to construct a line of railroad in California with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to the company by the Act of July 27, 1866. And there could not have been oversight, nor the inadvertence of expressing one thing when another was meant. Yet this is practically the contention of complainant. Not the conditions of the Act of 1866 are imposed on the grant, but the conditions imposed by § 9, conditions upon a different grant and a different company, is the contention, though complainant admits that "there is no question but that the language of Section 23 segregated from

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the act, of which it is a part, and construed alone, supports the contention of the appellees." The language gains, we think, not loses in strength from its location. It makes evident that there was a conscious contrast of provision between the grants and the companies.

Decree affirmed.